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## The Regulation and Administration of the Welfare Hearing Process – The Need for Administrative Responsibility

Robert E. Scott  
*Columbia Law School*, [rscott@law.columbia.edu](mailto:rscott@law.columbia.edu)

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## ARTICLES

### THE REGULATION AND ADMINISTRATION OF THE WELFARE HEARING PROCESS—THE NEED FOR ADMINISTRATIVE RESPONSIBILITY

*In recent years, the concept of public welfare has undergone substantial conceptual changes, the primary being a shift from the older concept of gratuity to one of statutory entitlement pursuant to the Social Security Act. This paper seeks to examine and analyze the administrative "fair hearing" as a means of effective regulation of administrative discretion and enforcement of the entitlement provisions of the federal act. Primary emphasis is placed on a comparative treatment of state hearing procedures and federal hearing regulations to determine whether the fair hearing is, at present, a viable means of insuring due process in welfare administration.*

ROBERT E. SCOTT\*

#### I. INTRODUCTION

Since the passage of the Social Security Act over thirty-four years ago,<sup>1</sup> the public welfare system in the United States has grown to astounding proportions. Soon over ten million Americans will be receiving payments under one or more of the categorical assistance pro-

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\* B.A., Oberlin College, 1965; J.D., College of William and Mary, 1968; LL.M., University of Michigan, 1969 (W W Cook Fellow). Visiting Instructor in Law, Marshall-Wythe School of Law, College of William and Mary

1. Social Security Act, ch. 531, 49 Stat. 620 (1935).

visions of the federal act.<sup>2</sup> Until recently, the social welfare structure and those who depended on it for their existence were largely ignored by the legal profession. The rapid growth of public welfare, coupled with increased concern for the rights of the poor, has produced a wealth of scholarly research and analysis of the policies and programs under which public welfare is administered. A part of this laudable effort has been inquiry into the existing means by which welfare recipients can enforce those rights granted to them by federal and state legislation as well as challenge federal and state policies which deprive them of basic constitutional liberties. Among the studies are those exploring the possibility of seeking federal judicial review,<sup>3</sup> appeal to the Department of Health, Education, and Welfare,<sup>4</sup> internal administrative controls,<sup>5</sup> and the direct application of constitutional guarantees and related federal legislation.<sup>6</sup> Largely ignored throughout this process of examination has been the one adjudicatory procedure established by the Social Security Act—the administrative “fair hearing.”<sup>7</sup>

Because of the federal nature of the welfare system, the fair hearing process varies with each participating state. Consequently, any analysis of this procedure must undertake to provide a comprehensive study on a national level. It is the purpose of this article to provide such an analysis by means of an examination of the hearing procedure as it is defined by federal law and regulations and as it is actually implemented in the various states. Section II deals with an examination of the historical basis for the fair hearing—the concepts underlying the Social Security Act, the basic structure of the welfare system and the effect of federal regulations

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2. These figures are projected from the nearly eight million recipients currently receiving categorical assistance. 1967 HEW ANN. REP. 5.

3. Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967).

4. Note, *Dependent Children and Social Welfare Legislation*, 15 J. PUB. L. 349 (1966).

5. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

6. Harvath, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210 (1967).

7. 42 U.S.C. § 302(a)(4) (1964) provides that a state plan must “provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness.” *Accord, id.* §§ 602(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).

42 U.S.C. § 306(a)(5) (Supp. III, 1968) authorizes federal financial participation in protection payments only with respect to a State whose State plan includes provision for “opportunity for a fair hearing before the State agency on the determination [of need for protective payments] for any individual with respect to whom it is made.” *Accord, id.* §§ 606(a)(E), 1206(5), 1355(5), 1385(a)(E).

promulgated pursuant to it. A review of the possible means of enforcing rights and correcting state policy is included with a view to clearly stating the problem which is presented in the following section. Section III undertakes the analysis of the federal hearing requirements and the extent to which the states comply. Section IV is devoted to an assessment of the state hearing regulations, an analysis of their provisions, and proposals and recommendations for reform feasible within the existing welfare structure.

## II. THE BASIS AND STRUCTURE OF CATEGORICAL ASSISTANCE —THE PROBLEM STATED

### *A. Historical Background.*

Prior to the enactment of the Social Security Act, the burden of welfare assistance remained in large measure the responsibility of private relief organizations. Although some states did have state-wide or local welfare programs, the extent of state contribution to those who could not support themselves was comparatively low.<sup>8</sup> It is not surprising, therefore, that during this period the poor, individually and collectively, were perceived not as "rights claimers" but as "alms seekers."<sup>9</sup> They accepted with humble gratitude whatever was given to them, having been taught "not to bite feeding hands, lest fodder be wholly denied."<sup>10</sup>

The Social Security Act represented a marked departure from the old welfare "dole" philosophy. The Act, in establishing a program for nation-wide participation of government in the relief of economic distress, recognized for the first time the principle that "the national interest requires that all people have sufficient income to provide for a living standard of health and well-being."<sup>11</sup> This concept of statutory entitlement,<sup>12</sup> though it has been substantially ignored in the adminis-

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8. U. S. DEP'T OF HEALTH, EDUCATION AND WELFARE, A CONSTRUCTIVE PUBLIC WELFARE PROGRAM iii (1965).

9. Gellhorn, *Poverty and Legality, the Law's Slow Awakening*, 9 WM. & MARY L. REV. 285 (1967).

10. *Id.* at 287.

11. U. S. DEP'T OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. I, 2000(1) (1968) [hereinafter cited as HANDBOOK].

12. The concept of "entitlement" based on the theory that dependency is a condition ordinarily beyond the control of the individual, and that welfare benefits are rights, based on the notion that everyone is entitled to a share of the common wealth, has been popularized by Professor Charles A. Reich of Yale University. E.g., Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965);

tration of public assistance,<sup>13</sup> finds specific recognition in the Social Security Act. Section 2(a)8 provides that a state must

provide that all individuals wishing to make application for assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.<sup>14</sup>

The full implications of this provision to the concept of the fair hearing can be understood only if one recognizes that unless the fair hearing provision of the Act is based on the right of each individual to apply and receive assistance, there are no grounds for asserting that available adjudicatory procedures must comply with expressed standards of administrative requirements and federal law. Finding, however, the clear concept of right enshrined in the enabling legislation, it cannot be denied that the fair hearing procedures as they are constituted in the various

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Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Social Welfare in the Public-Private State*, 114 U. PA. L. REV. 487 (1966).

Although Professor Reich popularized this concept and must be acknowledged as its author, the theory of "statutory entitlement" in reality finds its basis in the Social Security Act.

13. The evidence is overwhelming that the states administering public assistance programs have continued to regard the welfare client as a recipient of charity and have conditioned benefits on numerous restrictive eligibility requirements, including residency periods, maximum payments, suitable home requirements, substitute parent doctrines and the requirement of employment under adverse circumstances. In addition, the determination of need is based largely on the "means" test which entails an exhaustive check on income and resources available to the claimant, as well as scrutiny of the claimants' private affairs so as to detect any change in needs or available source of income. These practices have been fully analyzed and criticized by numerous studies and articles. E.g., Handler & Rosenheim, *Privacy in Welfare, Public Assistance and Juvenile Justice*, 31 LAW & CONTEMP. PROB. 377 (1966) (means test); Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963) (interference with personal liberty); Note, *Residence Requirements in State Public Welfare Statutes*, 51 IOWA L. REV. 1080 (1966) (residency tests); Note, *Dependent Children and Social Welfare Legislation*, 15 J. PUB. L. 349 (1966) (the substitute father doctrine).

Largely through the efforts of concerned segments of the legal profession a number of these restrictive and debilitating policies have been ordered abandoned either by the courts or the federal agency. The reason these practices have been allowed to continue at all rests largely on the structure of the public assistance system. Under the federal act, standards of dependency are left to be developed primarily by the states. The federal administrative requirements are more concerned that "such standards are uniform throughout the state, systematic and complete than they are about the specific provisions of the state plan." HEW, REPORT OF THE ADVISORY COUNCIL ON PUBLIC WELFARE 26 (1966).

14. 42 U.S.C. § 302(a) (8) (1969) (emphasis added). *Accord, id.* §§ 602(a) (10) (Supp. IV, 1968), 1202 (a) (11), 1352 (a) (10).

states must provide substantial procedural protection to aggrieved individuals.<sup>15</sup>

### *B. The Structure of Public Assistance.*

The Social Security Act was originally enacted August 14, 1935, and has been frequently amended by subsequent acts of Congress. The preamble of the Act as originally enacted reads as follows:

To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenues; and for other purposes.<sup>16</sup>

Under the public assistance titles of the Act,<sup>17</sup> the federal government provides substantial financial support for categories of needy persons. These programs include Old Age Assistance (OAA), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (AD), Aid to Families with Dependent Children (AFDC),<sup>18</sup> and general Medical Assistance (Medicare).<sup>19</sup>

The public assistance programs are administered by the states with grants-in-aid from the federal government. To secure federal financial support, a state must submit a "plan" for a particular program, and have the plan approved by the Secretary of Health, Education, and Welfare.<sup>20</sup> In order to meet the approval of the Secretary, a state plan must provide, *inter alia*, "for granting an opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness."<sup>21</sup> To-

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15. This concept and related issues are more fully explored in Section IV *infra*.

16. Social Security Act § 1, 49 Stat. 620 (1935).

17. 42 U.S.C. §§ 301 *et seq.*, 601 *et seq.*, 1201 *et seq.*, 1351 *et seq.*, 1381 *et seq.* (1964).

18. This title has been changed to Aid and Services to Needy Families with Dependent Children, but to avoid possible confusion, the old denomination of AFDC will be used throughout this paper.

19. Recent amendments emphasize the provision of preventive and rehabilitative services "to strengthen family life and to promote self-support and self-care." *HANDBOOK* pt. I, 3000. "States are encouraged to provide incentives to the recipients of public assistance to improve their condition and to prepare children for adult responsibilities." *Id.*

20. 42 U.S.C. §§ 301, 601, 1201, 1351, 1381 (1964).

21. *Id.* § 302(a)4. *Accord, id.* §§ 602(a)4, 1202(a)4, 1352(a)4, 1382 (a)4.

gether with the hearing requirement, the plan must provide "such methods of administration as are found by the Secretary to be necessary and proper for the proper and efficient operation of the plan."<sup>22</sup> In addition to the statutory standards, H.E.W. has added the requirement that classifications imposed by a state plan, especially eligibility criteria more restrictive than those obtainable under the federal statutes, must be "rational . . . in light of the purposes of public assistance programs."<sup>23</sup>

The Secretary of H.E.W. is required under the Act to discontinue federal aid to state programs which he finds, after a hearing, do not conform to the federal requirements,<sup>24</sup> but there is no established procedure for aggrieved individuals to request or compel such action.<sup>25</sup> As indicated above, other adjudicatory procedures including federal judicial review,<sup>26</sup> state court mandamus actions<sup>27</sup> and enforcement of the Social Security Act and H.E.W. regulations under 42 U.S.C. § 1983 as "rights, privileges, or immunities secured by the . . . laws" of the United States, have been proposed as possible means of enforcing rights under the categorical assistance programs.<sup>28</sup> Whether or not any or all of these procedures will eventually be recognized by the courts, the fact remains that the only viable existing procedure that is universally recognized as a means for enforcing the rights of welfare recipients is the administrative fair hearing.

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22. *Id.* § 302(a) (5) (Supp. III, 1968).

23. See A. Wilcox, General Counsel, HEW "Memorandum Concerning Authority of the Secretary Under Title IV to Disapprove Michigan Home Bill # 145" (March 25, 1963). HEW has given this doctrine the name "Condition X." See generally Note, WELFARE'S CONDITION X, 76 YALE L.J. 1222 (1967).

24. 42 U.S.C. §§ 304, 604, 1204, 1354, 1384 (1964).

25. Only one conformity hearing has been held since June, 1961 (that was held April 5, 1966 and involved Alabama's alleged failure to administer its programs without racial discrimination) and efforts by aggrieved claimants to petition the Secretary to hold a hearing in order to examine allegedly restrictive state policy have been dismissed for lack of standing. See generally Note, *Dependent Children and Social Welfare Legislation*, 15 J. PUB. L. 349 (1966).

26. Note, *supra* note 3.

27. The welfare statutes of many states provide that state welfare agencies shall conform to federal requirements. See, e.g., MICH. STAT. ANN. 400.10 (1967). It has been argued that these statutes incorporated federal requirements so that they are enforceable as state law. In support of this position, see *Pearson v. State Social Welfare Bd.*, 54 Cal. 2d 184, 353 P.2d 33 (1960); *Fenton v. Department of Pub. Welfare*, 132 N.E.2d 528 (Mass. 1962); *State v. Brandjord*, 108 Mont. 417, 92 P.2d 273 (1939); *Multnomah County v. Luhn*, 178 P.2d 159 (Ore. 1947); *Morgan v. Department of Social Security*, 14 Wash. 2d 156, 127 P.2d 686 (1942).

28. Note, *supra* note 3, at 109-15.

*C. The Nature and Effect of Federal Regulations Under the Social Security Act.*

Section 1102 of the Social Security Act authorizes the Secretary of H.E.W. to "make and *publish such rules and regulations*, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [he] is charged under this Act."<sup>29</sup> The Secretary has delegated his authority to interpret and enforce the federal requirements and to publish regulations consistent with that purpose to the Administrator of the Social and Rehabilitation Service.<sup>30</sup> The Administrator, in the exercise of this delegated statutory authority, has published the *Handbook of Public Assistance Administration*. Regulations relevant to the public assistance programs are set forth in the *Handbook* and are made available to all state agencies administering or supervising programs under the public assistance titles. The regulations are promulgated in the form of interpretations of the Social Security Act, requirements for state plans, criteria for administration of state plans, conditions for federal financial participation, and recommendations for improving public assistance programs and administration.<sup>31</sup> New regulations and policy revisions are brought to the attention of the states through Handbook Transmittals and Interim Policy Statements, and are either mandatory or permissive. Mandatory requirements are deemed to be essential under the law. The test of essentiality is whether or not the state could comply with the relevant statutory provisions without meeting such requirements.<sup>32</sup>

Until recently the legal force and effect of the regulations and requirements issued in the *Handbook* had been in some doubt. However, in the case of *King v. Smith*,<sup>33</sup> which overturned Alabama's "substitute father" regulation, the Supreme Court ruled that state plans of public assistance "must conform with several requirements of the Social Security Act *and with rules and regulations promulgated by H.E.W.*"<sup>34</sup>

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29. 42 U.S.C. § 1302 (1964) (emphasis added).

30. Formerly the Commissioner of Welfare Administration.

31. HANDBOOK pt. I, 4210.

32. *Id.* 4210(2).

33. 392 U.S. 309 (1968). By deciding the case on the basis of the Social Security Act, the Court found it unnecessary to reach the question of whether the regulation was constitutionally defective under the equal protection clause.

"While *King* bars the use of a substitute father or man-in-the-house rule as an eligibility test," the Court decision leaves open the question concerning the use of such rules as a means test. 13 WELFARE L. BULL. 2 (1968).

34. 392 U.S. at 317 (emphasis added).



Following the rules established by the Court in *King*, it is now clear that the states must comply with all the mandatory hearing regulations promulgated by H.E.W. to avoid violating the Social Security Act. Since these regulations have the force of law, non-compliance by the states would constitute a clear violation of the "laws" which "secured" rights, privileges, and immunities to individuals within the meaning of 42 U. S. C. § 1983. Thus, a claim for redress under Section 1983 exists against those responsible for state welfare practices which causes a deprivation of the rights so secured.

#### *D. The Significance of the Hearing Process.*

Since the legal profession has awakened, at last, to those policies prevalent in welfare administration which in large measure restrict the rights and personal freedoms of the recipients and applicants, concern has focused on methods of enforcing those rights and overturning those policies which arguably violate the Constitution and the Social Security Act. It is not within the scope of this paper to analyze the nature of these policies and the efforts that have been made to have them changed. It is sufficient that there is general recognition of a need for an effective means of enforcing rights in relation to both individual decisions and universally applicable policies.

As indicated above, the only universal means of enforcing the rights of welfare recipients that is presently available is through the administrative fair hearing procedures authorized under the Social Security Act. The administrative fair hearing is not an unknown quantity. Over the past thirty years a large body of experience and law has been established with respect to hearing regulations in administrative agencies which undertake regulation of economic affairs. The experience of other government agencies has proven that, given the necessary procedural guarantees, the fair hearing can be an accepted and effective means of challenging agency policy and enforcing established rights.<sup>35</sup> The practices of other agencies has made possible the identification of standards which characterize this process. These standards have established, *inter alia*, that: (1) the rules on which the grounds of decision are based are clearly formulated in advance of any action;<sup>36</sup> (2) the proposed rules should

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35. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1252 (1965).

36. See, e.g., Administrative Procedure Act § 3, 5 U.S.C. § 1002 (1964). "Every agency shall separately state and currently publish . . . substantive rules adopted as authorized by law. . . ." See generally K. DAVIS, ADMINISTRATIVE LAW 130 (1960); Reich, *supra* note 35.

be available for public comment prior to their promulgation;<sup>37</sup> (3) prior to any action there is actual notice of the proposed action and a complete statement of the basis for it;<sup>38</sup> (4) the pertinent facts are established in a proceeding at which the aggrieved individual can be apprised of the evidence and have an opportunity to rebut it; factual findings are based on non-hearsay testimony given in open proceedings;<sup>39</sup> (5) the aggrieved individual has the right and opportunity to be represented by counsel;<sup>40</sup> (6) there is a clear separation between those who investigate and institute actions and those who hear the facts and make the decision;<sup>41</sup> (7) the decision should be based on expressed findings and published reasons;<sup>42</sup> and (8) there is an opportunity for review of the decision by the agency and the courts.<sup>43</sup>

On the basis of these procedures which are established practice in other administrative agencies, it has been persuasively argued that a welfare hearing process which incorporated many of these procedures would similarly serve as an effective means of enforcing rights and establishing the correctness of administrative decisions.<sup>44</sup> This argument, however, has not won universal acceptance. There are those who contend that this "full adjudicatory procedure" is not relevant to the administration of public assistance, that a full group of procedural rights

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37. See, Administrative Procedure Act § 4, 5 U.S.C. § 1003 (1964): "[T]he agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." K. DAVIS, *supra* note 36, at 124: "Informal written or oral consultations with affected parties is the mainstay of rule-making procedure." See also Reich, *supra* note 35.

38. Administrative Procedure Act § 9, 5 U.S.C. 1008 (1964). This is based on the theory expressed in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), that due process requires that the aggrieved individual have an opportunity to rebut and explain the evidence against him. See K. DAVIS, *supra* note 36, at 168; Reich, *supra* note 35.

39. See, e.g., the hearing procedures established in Administrative Procedure Act, § 7, 5 U.S.C. § 1006 (1964); Reich, *supra* note 35.

40. Administrative Procedure Act, § 6, 5 U.S.C. § 1005 (1964).

41. Administrative Procedure Act § 5, 5 U.S.C. § 1004 (1964). "No officer . . . engaged in the performance of investigative or prosecuting functions . . . shall . . . participate or advise in the decision. . . ." Reich, *supra* note 35.

42. Administrative Procedure Act § 8, 5 U.S.C. § 1007 (1964), "All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or the basis therefor . . . ." Reich, *supra* note 35.

43. Administrative Procedure Act § 10, 5 U.S.C. § 1009 (1964). "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Reich, *supra* note 35.

44. See Reich, *supra* note 35.

are of little use to the welfare client who must continue to deal in the future with the welfare caseworker who made the original contested decision, and that fear of alienation and reprisal will prevent implementation of these procedural guarantees.<sup>45</sup> Those who advocate this position emphasize instead that enforcement of the rights of welfare recipients can be best effected through administrative and legislative reform which is capable of attacking the discretionary and permissive areas of welfare administration. Thus, it is argued that by strengthening the administrative system we can create conditions under which officials will be more receptive to fulfilling legislative and administrative requirements.<sup>46</sup>

A superficial response to this latter argument is that, although there is a need for better administration of public assistance, legislative and administrative reform are long term goals. Over the short term it is necessary to enforce those rights already available to the recipients and the only established means available for that purpose is the fair hearing. Further, it is arguable that improved and effective hearing procedures will not cause welfare caseworkers and administrators to retaliate in future dealings with the recipient. Rather it might cause officials to be more careful in future dealings to ensure the recipient the full measure of his rights in order to avoid the necessity of additional hearings requiring the official to justify his decision in an open and impartial forum.

All these arguments, however, proceed from a lack of understanding of the existing nature and provisions of the hearing process in welfare administration. Before judgments on these and other questions can validly be made, it is necessary to gain some insight into the welfare hearing process as it is presently constituted. A complete review and analysis of this process has not been undertaken to date, and consequently much of the legal commentary proposing alternative methods of rights enforcement has of necessity proceeded from ignorance of the hearing system. To provide a basis for future judgments, the following sections will undertake an analysis of the fair hearing as it is reflected in the regulations of the federal agency and those of the various states.<sup>47</sup>

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45. See Handler, *Controlling Official Behavior in Welfare Administration*, LAW OF THE POOR 158 (1966). Professor Handler responds directly to Professor Reich's call for an effective hearing process by asserting that procedural rights will not reach the problem of causing welfare officials to implement national and state legislative goals. *Id.* at 170.

46. *Id.* at 176.

47. See Reich, *supra* note 35, at 1256.

### III. THE FEDERAL HEARING REQUIREMENTS AND STATE REGULATIONS COMPARED—DO THE STATES COMPLY?

#### A. General Description.

The Social Security Act provides that, a state plan must

provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for [aid or] assistance under the plan is denied or is not acted upon with reasonable promptness.<sup>48</sup>

In accordance with its delegated statutory responsibility to promulgate regulations pursuant to the Act, the Social and Rehabilitation Service (formerly the Welfare Administration) of H.E.W. has issued a series of rules designed to govern the conduct of the fair hearing by the participating state agencies.<sup>49</sup> These rules are in the form of requirements for state plans,<sup>50</sup> criteria for the administration of the plans,<sup>51</sup> interpretation of the requirements,<sup>52</sup> and statements outlining those programs and policies in which federal financial participation is available.<sup>53</sup> Furthermore, many states, in addition to the enabling legislation directing the state agency to conform to the several requirements of the Social Security Act in order to secure the necessary federal financial aid for their public assistance programs, have similar statutes requiring the provision for a fair hearing by the responsible state agency.<sup>54</sup> Pursuant to the Federal Act and regulations thereunder, as well as their own applicable state legislation, every state agency administering public assistance has promulgated regulations designed to control and direct the institution and conduct of the fair hearing process.

Prior to an examination and analysis of the federal and state regulations governing fair hearings, it is necessary to describe the context in which the procedure is implemented. An individual who first makes

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48. 42 U.S.C. § 302(a)(4) (1964). *Accord, id.* §§ 602(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4). For similar fair hearing provisions with specific relevance to protective payments, *see* note 7, *supra*.

49. HANDBOOK pt. IV, 6000-999.

50. *Id.* 6200.

51. *Id.* 6300.

52. *Id.* 6400.

53. *Id.* 6500.

54. *See, e.g.,* MICH. COMP. LAWS ANN. §§ 400.56-57 (1967); TEXAS REV. CIV. STAT. ANN. art. 695(c), §§ 16-c, 25(1) (1964).

application for public assistance under a federally approved plan begins at the "intake" procedure which processes and categorizes new applicants for assistance.<sup>55</sup> Assuming compliance with federal standards, the applicant is given appropriate notice at this time of his rights under the Act, including the right to a fair hearing. The same notice requirement exists at any future date when the applicant or recipient is advised of any decision affecting his receipt of assistance. Throughout this initial process, and continuing indefinitely if his request is granted, the client's only contact with the agency is with the caseworker employed by the local county or regional office.<sup>56</sup> It is the caseworker who is charged with the function of fulfilling the notice requirements, attempting to resolve and satisfy client dissatisfaction, and who ultimately initiates the hearing process when a request for a hearing is made.<sup>57</sup>

Upon the initiation of such a request, the local administrators and supervisors as well as a representative of the state office become involved. The responsibility for the conduct of the hearing and the fulfillment of those requirements which follow upon such an action rests with the state agency.<sup>58</sup> However, in most instances the caseworker continues to be involved through the submission of a summary of the local office's position and the action taken pursuant thereto. Furthermore, in many states, the caseworker, alone or in conjunction with local supervisory personnel, is charged with presenting the case for the county agency at the hearing.<sup>59</sup> Because this division of responsibility within the agency often affects the nature of the regulations promulgated by the states, it is necessary to keep in mind the context in which the regulations are operable during the analysis and comparison of the hearing provisions.

As indicated earlier, the federal regulations have established requirements governing the procedures by which the states implement the fair hearing provision of the Social Security Act. The fact that these requirements are deemed essential under the law<sup>60</sup> does not, however, automatically insure that the administrative hearings available in the states comply with the federal regulations. Consequently, the follow-

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55. Welfare Caseworker Interview.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See note 32 *supra*.

ing sub-sections will analyze these requirements in an attempt to determine: (1) what the federal regulations require; (2) what the states provide; and (3) the extent of compliance with the federal rules.

### *B. State Agency Responsibility.*

Because the Social Security Act permits various kinds of state administration of public assistance, including state supervision of local administration, it is essential that the federal regulations identify the source of responsibility for the hearing process within the state. To insure some measure of state-wide uniformity, the regulations provide that "[T]he State agency will be responsible for fulfillment of fair hearing provisions, and shall specify the hearing authority."<sup>61</sup>

It is not surprising, in view of the nature of this provision, that every one of the fifty states participating in the public assistance program has implemented this provision and fully complied with the federal requirement. Pursuant to their assumption of responsibility for the fulfillment of the fair hearing provisions,<sup>62</sup> all state agencies have issued administrative regulations which are intended to establish the necessary fair hearing procedures to be followed by the local and state welfare officials.<sup>63</sup>

To implement the second part of this provision, the state welfare agencies have designated the hearing authority within the agency who is charged with rendering the final administrative decision. Because of the wide latitude permissible under the federal requirement, there is considerable variety in the nature of the hearing authority among the states. The majority of states have designated the State Director or chief administrative officer of the welfare agency as the appropriate hearing authority.<sup>64</sup> Others have rested the final decision-making authority on the State Welfare Board which generally serves a policy-

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61. HANDBOOK pt. IV, 6200(a).

62. Handbook Transmittal No. 140 (Feb. 8, 1968).

63. The former federal provision required only that the state must provide "for specific designation of responsibility within the agency for conduct of hearings." Handbook Transmittal No. 56 (Sept. 9, 1965).

64. E.g., CALIFORNIA DEPARTMENT OF SOCIAL WELFARE MANUAL 22-069(1) (1968); IDAHO MANUAL OF OPERATING POLICIES AND PROCEDURES ch. 3, § 3385.1 (1960); INDIANA PUBLIC ASSISTANCE MANUAL tit. XII, § II(C) (1963); MAINE PUBLIC ASSISTANCE PAYMENTS MANUAL ch. I, § c, p. 4 (1968); MARYLAND PUBLIC ASSISTANCE MANUAL § 225.5 (1964); MASSACHUSETTS PUBLIC ASSISTANCE POLICY MANUAL, ch. IV, § 3(a) (1968); MICHIGAN MANUAL OF SOCIAL SERVICES pt. H, § 389 (1949).

making and advisory function to the agency.<sup>65</sup> A few states have rejected this approach and have designated either a specially created Appeals Committee<sup>66</sup> or the Hearing Officer himself<sup>67</sup> as the final authority.

Although all these provisions comply with the rather general requirement of the federal regulations, a strong argument can be made that to avoid inconsistency with other federal provisions, the hearing authority should be one who is also charged with the policy making functions of the state agency. In some states the State Administrator is equally charged by law with the duty of formulating policy for the department, and in these instances final decision by him or his designated agent presents no potential conflict. However, in a number of states where the hearing authority is the State Administrator, the policy making functions of the agency remain with the State Board.<sup>68</sup> In these instances it would seem impossible for the hearing authority, who is not charged with promulgating or deciding policy, to hear and decide the validity of a policy claim. As a consequence, the state agency might be unable to comply with those federal requirements authorizing appeals based on agency policy, regardless of regulations to the contrary. Thus, although all the states are in literal compliance with federal law in the designation of a hearing authority, in some instances conflicts with other provisions may result in potential violations.

### *C. Grounds for Requesting a Fair Hearing—The Policy Appeal.*

Under the federal regulations a state plan must provide that:

An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim

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65. ARIZONA PUBLIC WELFARE MANUAL § 3-12073 (1965) (State Board of Public Welfare); COLORADO PUBLIC ASSISTANCE MANUAL § 4724.1 (1968) (State Welfare Board); FLORIDA MANUAL OF PUBLIC WELFARE ch. 100, § V (1967) (State Board); ILLINOIS CATEGORICAL ASSISTANCE MANUAL § IV (1963) (Illinois Public Aid Commission); IOWA DEPARTMENT OF SOCIAL WELFARE MANUAL VI-13.1 (1966) (State Board of Social Welfare).

66. ARKANSAS DPW MANUAL § 6350.1 (1968) (The Committee on Fair Hearings); DELAWARE PUBLIC WELFARE MANUAL § 5910(n) (1967) (Appeal Board); KANSAS PUBLIC ASSISTANCE MANUAL § 5370 (1956) (Appeals Committee); KENTUCKY PUBLIC ASSISTANCE MANUAL OF OPERATION § 4300 (1967) (Appeal Board).

67. E.g., CONNECTICUT PUBLIC ASSISTANCE MANUAL vol. I, § 6090(1) (1968); HAWAII PUBLIC WELFARE MANUAL § 2503(9) (1968).

68. E.g., California, Indiana, Kansas and Louisiana. CHARACTERISTICS OF THE STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, U.S. DEP'T OF H.E.W., PUBLIC ASSISTANCE REPORT No. 50 (1962).

for assistance is denied, is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting his receipt or termination of assistance, *or by agency policy as it affects his situation.*<sup>69</sup>

The federal agency has interpreted this provision to require a fair hearing which will include: (1) consideration of any action on a claim for assistance which involves undue delay in reaching a decision on eligibility, making a payment, refusal to consider a request, making an adjustment in payment or on suspension or discontinuance of eligibility; (2) consideration of all agency decisions regarding eligibility, amount of assistance, manner or form of payment, and conditions of payment, including work requirements; and (3) consideration of the agency's *interpretation of the law*, and the reasonableness and suitableness of the *policies promulgated under the law*, if the claimant is aggrieved by them.<sup>70</sup>

The requirement outlining the grounds for appeal taken in conjunction with the interpretive provisions establish the federal policy that an appeal can be taken by an applicant or recipient under any circumstances in which the claimant feels aggrieved by agency action or inaction regardless of the basis for such action. The requirements are inclusive and pervasive. They are intended to allow a hearing request under any conceivable circumstances and to forbid the state agencies from in any way restricting this fundamental right.<sup>71</sup>

With regard to the more traditional grounds for requesting a hearing—eligibility, amount of assistance, termination, delay,—the state regulations have little difficulty. Forty-eight states<sup>72</sup> have provisions allowing clients to institute an appeal on the basis of these fundamental

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69. HANDBOOK pt. IV, 6200(b) (emphasis added).

70. *Id.* 6300(c)(1)-(3) (emphasis added). This requirement remained unchanged in the February 1968 revisions with one significant exception; the provision for policy appeals which had previously been found only in the interpretive provisions of the regulations was made a specific and express requirement for state plans.

71. This fact is emphasized in the interpretive provisions of the regulations which state:

The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim is a fundamental right. . . . [E]very aggrieved claimant is entitled to the opportunity for a hearing.

HANDBOOK pt. IV, 6400(a).

72. California and Massachusetts have no provision in their regulations specifying permissible grounds for appeal. See Appendix *infra*.



grounds. The provisions are generally complete in this respect and fully comply with stated federal policy.<sup>73</sup>

Substantial non-compliance is found, however, with the single most significant ground of all, the policy appeal. Because of the possibility of agency policies and practices which restrict the full exercise of a claimant's right to public assistance payments, a means of appeal whereby the client is afforded an opportunity to challenge agency policy and interpretation of the law is of utmost importance. The significance of the policy appeal has not been lost on the federal agency. Not only is a policy appeal an explicit requirement for all state plans, but such grounds are further emphasized in other sections of the regulations.<sup>74</sup> It is clear that policy appeal provisions remain at the cornerstone of an effective hearing procedure. Without this provision, or one substantially comparable, the states will have significantly reduced the scope of the fair hearing as an effective remedy for aggrieved claimants.

An analysis of the hearing regulations of the various states discloses a failure to achieve substantial compliance with this provision by a majority of those administering categorical assistance.

FIGURE 1—THE POLICY APPEAL

	States in Substantial Compliance	Some Provision But Insufficient	No Provision at All	Violative or Restrictive	Undetermined
Number of States	17	8	20	1	4
Percentage	34%	16%	40%	2%	8%

73. For a typical example of the state provisions in this regard, see *FLORIDA MANUAL OF PUBLIC WELFARE* ch. 100, § V (1967):

The client shall . . . be advised that he may request a hearing when he believes any of the following conditions exist:

- (a) When opportunity to make application has been denied;
- (b) When application has been rejected;
- (c) When application has not been acted upon within a reasonable length of time as provided by agency policy for action on applications;
- (d) When grant is inadequate, or inequitable in relation to agency standards of assistance;
- (e) When grant has been modified, or discontinued;
- (f) When reconsideration is refused or delayed.

74. See note 70 *supra*.

Only seventeen states have provisions which achieve substantial compliance with the federal regulations.<sup>75</sup> In several of the states complying, the emphasis on the freedom to question agency policy is clear. For example, the RHODE ISLAND PUBLIC ASSISTANCE SERVICE MANUAL provides that the major objectives of the fair hearing process are, *inter alia*

[to] reveal aspects of agency policy that are inequitable or constitute a misinterpretation of the law; to submit policy to scrutiny and discussion; and to furnish the agency with evidence indicating the need for modification of policies and procedures and the nature of the needed modification.<sup>76</sup>

It continues with the statement that "[t]his provision [regarding the basis of a request for a fair hearing] is intended to be broad and to include questions on the agency action itself, on the failure to act, *or on the policy under which the action was taken.*"<sup>77</sup>

Few of the complying states go as far as this in emphasizing the availability of an appeal based entirely on agency policy, but their failures are less significant in view of the number of states with insufficient provisions,<sup>78</sup> or with no provisions at all.<sup>79</sup> Together, these two groupings comprise a majority of the participating states in which the policy appeal is not available in any substantial degree to an aggrieved claimant. Although it might be argued that in the absence of a provision prohibiting policy appeals such grounds are still available, in at least one jurisdiction that argument has been decisively precluded. The Alabama regulations provide that during the conduct of the hearing "the hearing officer will not hear complaints or arguments about *Federal and State laws or policies.*"<sup>80</sup> Although none of the other states have provisions which so clearly prohibit the institution of

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75. For a list of the provisions in each state, see Appendix *infra*.

76. RHODE ISLAND PUBLIC ASSISTANCE SERVICE MANUAL ch. IV, Fair Hearings, § 1(E) (1963).

77. *Id.* § II (emphasis added).

78. For an example of states which give some indication of the right to a policy appeal, but whose provisions are inadequate, see KENTUCKY PUBLIC ASSISTANCE MANUAL OF OPERATION § 4005(9) (1968), which includes among appealable issues, "[a]ny other issue that has adversely affected his claim." For a better provision than this, though still inadequate, see KANSAS PUBLIC ASSISTANCE MANUAL § 5323.1(7) (1956), which provides that an applicant may appeal if "dissatisfied with any other policy or action or failure to act with respect to his complaint." For a list of states with insufficient provisions for policy appeals, see Appendix *infra*.

79. See Appendix *infra*.

80. ALABAMA PUBLIC WELFARE MANUAL pt. I, §§ II, II(2) (1968).

an appeal challenging agency policy, the fact that no such grounds are recognized in the state regulations would seem to effectively preclude this basis for an appeal.

This analysis confirms that which has previously been asserted—many states do not consider the fair hearing a forum for the consideration of legal questions.<sup>81</sup> This failure is not an insignificant one in terms of the efficacy of the fair hearing process. In many instances, agency policy, not the decision made pursuant to that policy, is the only grounds for complaint by the claimant. Unless he can challenge the policy itself he cannot prosecute an appeal against a decision which adheres to that policy.<sup>82</sup> In such instances, which may constitute the major grounds for grievance,<sup>83</sup> the claimant is denied recourse to the fair hearing procedure in clear violation of the federal law.

#### *D. Notice Requirements.*

Perhaps no other provision of the federal regulations is as important to an effective hearing procedure as the requirement that the claimant be given full and adequate notice of his rights in the fair hearing process. The federal regulations provide that:

Every claimant will be informed in writing at the time of application and at the time of any agency action affecting his claim

- (1) of his right to a fair hearing;
- (2) of the method by which he may obtain a hearing;
- (3) that he may be represented by others including legal counsel; and
- (4) of any provision for payment of legal fees by the agency.<sup>84</sup>

The significance accorded this provision by the federal regulations is emphasized in subsequent provisions which more fully explain the content of the notice procedure.<sup>85</sup> The notice requirement has been

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81. NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, HANDBOOK OF WELFARE LAW, at 20:1 (1968).

82. Interview with George Stewart, Attorney, Legal Aid Clinic, Ann Arbor, Michigan, Feb. 10, 1969.

83. *Id.*

84. This and the following provision regarding payment of legal fees are new, having been transmitted to the states along with the other revisions on Feb. 8, 1968. It is consistent with other new provisions emphasizing the role of the attorney in the hearing process. See Section V *infra*.

85. See HANDBOOK pt. IV, 6300(j):

interpreted under the federal rules as requiring oral explanation as well as written notice at the designated times. Regulations provide that written notification of the right to a hearing may be on the application form and on other forms used by the agency in communications with applicants and recipients as well as on explanatory pamphlets distributed by the agency.<sup>86</sup> Emphasis is given to the fact that oral explanations should also be made at intake and at the time of any subsequent change in eligibility. The full thrust of these and related provisions is to clearly establish that the notice requirements, both written and oral, are designed "to assure that the claimant *fully understands this right*. This right is further assured by the agency explaining the right to a hearing in understandable terms and in being helpful as needed in the preparation for and conduct of the hearing."<sup>87</sup>

The federal notice requirements contain three elements necessary for full compliance: (1) there must be notice of the right to a hearing;

FIGURE 2—NOTICE REQUIREMENTS

	States	States Which Comply	Some Provision But Insufficient	No Provision at All	Violates or Restricts	Undetermined
Right to Hearing	No.	39	1	7	0	3
	%	78%	2%	14%	0	6%
Right to Attorney	No.	11	4	22	0	3
	%	22%	8%	44%	0	6%
Emphasis on Explanation	No.	21	4	22	0	3
	%	42%	8%	44%	0	6%
Complete Notice Provision	No.	9	31	7	0	3
	%	18%	62%	14%	0	6%

Written notification and, to the extent possible, oral explanation of the right to and procedure for requesting a fair hearing are given at the time of application. Written notice, and oral explanation as necessary, are given at the time of any agency action affecting the claim for assistance, including change in or termination of assistance.

86. HANDBOOK pt. IV, 6400(c). In an effort to assist the states in complying with the written aspect of the notice requirement, H.E.W. publishes informational brochures describing the right to a fair hearing to be distributed to applicants.

87. *Id.* (emphasis added).

(2) there must be notice of the right to an attorney, and the means available, if any, to secure one; and (3) there must be a clear explanation of these rights to the claimant so that he fully understands them. For the state regulations to comply with the federal rules they must incorporate all three of these elements.

Only nine of the state regulations fully comply with the notice provisions of the *Handbook*.<sup>88</sup> (See Fig. 2 *supra*.) Although most of the states make some provision regarding notice to the claimant of his right to a fair hearing, this generally takes the form of a simple notice that he shall be informed of his right to a hearing at the time of application and/or subsequent decision.<sup>89</sup> Furthermore, seven states have no notice provision at all in their regulations.<sup>90</sup> This omission, though it represents only a minority of the states, is a serious indictment of the hearing process in those jurisdictions, and reinforces the view that, in many cases, the applicant is never apprised of this right in any way.<sup>91</sup>

The single most significant omission of those state regulations which do have some provision is the failure to provide for notice to the client of his right to be represented by legal counsel throughout the hearing process. Of the states which do provide that notice of this right must be afforded the claimant, only a handful go so far as to indicate that the claimant should be referred to a local legal aid office if he is unable to afford the services of an attorney.<sup>92</sup> None of the states has provided

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88. Alaska, California, Connecticut, Delaware, Hawaii, Montana, Ohio, Pennsylvania and West Virginia. See Appendix *infra*.

89. *E.g.*, ALABAMA PUBLIC WELFARE MANUAL pt. I, § II (1968):

At the time of application and the time of any [subsequent] agency action affecting an applicant's or recipient's claim to assistance, give him a written statement of the right to a hearing and the method by which a hearing may be obtained.

90. Arizona, Illinois, Indiana, Iowa, Massachusetts, Nevada, and Oklahoma. See Appendix *infra*.

91. Welfare Caseworker Interview. See also Briar, *Welfare from Below: The Recipients Views of the Public Welfare System*, LAW OF THE POOR, 46, 47 (1966), reporting the published results of a study in which 60% of the recipients interviewed reported that they were not informed about the right to appeal.

92. Only eleven states provide for notice of the right to any attorney at time of application and/or adverse agency action. See Appendix *infra*. Of these states only New York, North Carolina, Delaware and Ohio go so far as to make provision for referral to legal services. *E.g.*, NEW YORK PUBLIC ASSISTANCE MANUAL § IV(B)(4) (1968):

The social services official . . . upon the request of the appellant for legal counsel to assist him in the fair hearing shall refer the appellant to community legal services available for such purposes.

a complete legal services program for which federal financial participation is available, and a number even discourage the participation of the attorney in the hearing process.<sup>93</sup> Two-thirds of the states' regulations make no provision for notice of the right to an attorney at the initial stage in the proceeding, and the fact that some do provide such notice just prior to the hearing does not cure this defect. This demonstrates one of the central failings of the hearing process as it is presently constituted in the states—representation by counsel is neither encouraged nor appreciated by most of the state and local agencies.<sup>94</sup> The few who have recognized the significance of the attorney in the hearing process only serve to emphasize the inadequacies of the remainder. The significance of this fact, in light of new regulations requiring legal representation at fair hearings, will be more fully explored later (*see* sub-section V, *infra*).

The second omission found in a significant number of states is the failure to provide for a full and complete explanation of the right to a hearing. (*See* Fig 2, *supra*.) This requirement is not less significant than the one regarding notice of the right to an attorney. It is doubtful that the average caseworker, overburdened as he is, will take the time to fully explain these rights unless the state regulations specifically direct him to do so. If the emphasis on such procedure is absent at the state level, there is small hope of finding it in practice at the local level.<sup>95</sup> Again the federal requirement is clear and permits no varying interpretation, and yet, forty-four percent of the states' regulations lack provisions requiring the local agency to provide a detailed explanation of the hearing rights.

In sum, the notice requirement of the federal rules, although among the most basic and crucial to the hearing process, has received only partial compliance by a majority of the states. This failure cannot be cured by elaborate provisions governing the applicant's rights during the hearing. As he is generally unaware that he possesses any rights at

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93. *E.g.*, MINNESOTA PUBLIC WELFARE MANUAL § VIII-6422 (1964) which states that the hearing process should be free from rules of procedure because otherwise "it might . . . compel some petitioners to seek legal counsel. . . ."

OKLAHOMA DEPARTMENT OF PUBLIC WELFARE MANUAL § 546.71 (1968): "Legal counsel is unnecessary, but the privilege of counsel is not denied when it is desired by the client."

94. *See* sub-section V *infra* and notes following.

95. In an effort to secure compliance by the State of New York with this aspect of the notice provision of the federal regulations, a suit was instituted on behalf of welfare recipients to enjoin the New York agency from implementing the state's fair hearing procedures on the grounds that on their face they violated the federal regulations. *Royal v. Wyman*, Civil No. 3237 (S.D.N.Y., filed Aug. 6, 1968).

all, it is necessary that the claimant be fully informed of his right to a fair hearing, if the process is to remain effective.

*E. The Request Clause—What Constitutes a Hearing Request?*

The federal regulations provide that a request for a hearing by a claimant is considered as

any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative or friend) to the effect that he wants an opportunity to present his case to higher authority. The freedom to make such a request is not limited or interfered with in any way, and agency emphasis will be in helping the claimant in submitting and processing his request, and in preparing his case, if needed.<sup>96</sup>

The clear emphasis of the federal requirement is that the claimant need not make his request in any specific manner or employ any specific form. Any indication of a desire to appeal should be sufficient to institute the hearing process, and no barriers can be placed in the claimants way which would serve as a possible impediment to the institution of an appeal.<sup>97</sup>

FIGURE 3—REQUEST CLAUSE

	States Which Comply	Some Provision But Insufficient	No Provision at All	Violates or Restricts	Undetermined
Number of States	24	5	5	13	3
Percentage	48%	10%	10%	26%	6%

Less than a majority of the state regulations have provisions which substantially comply with the federal request clause.<sup>98</sup> A small number of states make some provision identifying what constitutes an acceptable request which fails to sufficiently specify the liberal and unrestricted nature of the federal rule,<sup>99</sup> and an equal number make no provisions for requests at all.<sup>100</sup> More serious is the large number of

96. HANDBOOK pt. IV, 6300(b).

97. *Id.*

98. See Figure III *supra*. For a list of each state's provisions, see Appendix *infra*.

99. E.g., MARYLAND PUBLIC ASSISTANCE MANUAL § 225.3 (1966): "An appeal for a fair hearing is made by the use of Form # 334, provided for the purpose and addressed to the State Department of Public Welfare." For a list of states with incomplete provisions, see Appendix *infra*.

100. Arizona, Illinois, Indiana, Iowa and Massachusetts. See Appendix *infra*.

state regulations which impose restrictions on the freedom of the claimant to request a fair hearing. Most of these restrictions are based on a requirement that a request by the claimant must be made in writing.<sup>101</sup> For example, the Louisiana regulations provide that when a client desires to request a fair hearing he shall be provided with an appropriate form and "advised to submit it to the Commissioner."<sup>102</sup> By not recognizing an appeal request until such time as it has been reduced to a written statement, the agency places a serious impediment in the way of the appellant which constitutes a direct violation of the federal regulations. Other states have provisions not so clearly violative of the federal rules, but which none the less create additional barriers for the claimant who desires to request an appeal. The Minnesota regulations, for example, provide that prior to the claimant requesting a fair hearing before the state welfare board the decision must be subjected to a rehearing by the county agency.<sup>103</sup> This and similar procedures would seem to be in violation of the federal requirement that "the freedom to make . . . a request is not limited or interfered with in any way."

#### *F. Reasonable Time to Appeal.*

The *Handbook* provides that in the state hearing regulations "provision (must be) made for *reasonable time* in which to appeal agency action."<sup>104</sup> What constitutes a reasonable time is not explained in the federal rules, and arguably, the states have considerable latitude in the time limits for an appeal. The state regulations exhibit a wide range of time limits allowable to claimants to institute an appeal. Thirty states have complied with the federal requirements, at least in so far as they have made some provision for a time limit of appeal.<sup>105</sup> The majority of these states allow thirty,<sup>106</sup> sixty,<sup>107</sup> or ninety days.<sup>108</sup> Because the

101. Those states that require or imply the necessity of written requests are Alabama, Louisiana, Maryland, Michigan, Nebraska, Nevada, North Dakota, North Carolina, Pennsylvania, South Dakota and Virginia. See Appendix *infra*.

102. LOUISIANA PUBLIC WELFARE MANUAL pt. XV, § 2-1501 (1968).

103. MINNESOTA PUBLIC WELFARE MANUAL pt. VIII, §§ 6433-34 (1964).

104. HANDBOOK pt. IV, 6300(d) (emphasis added).

105. For a list of states with some provision for a time limit on appeals, see Appendix *infra*.

106. E.g., Arizona, Arkansas, Connecticut, Kansas, Louisiana, Maine, Minnesota, South Dakota and Virginia.

107. E.g., Alabama, Florida, Georgia, Idaho, Illinois, New Mexico, New York and South Carolina.

108. E.g., Colorado, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, and Texas.



federal requirements have placed no interpretation on "reasonable time" none of these provisions can be considered unreasonable per se, although a time limit of at least sixty days would seem desirable.<sup>109</sup> Of the remaining states with some provision, only Tennessee which allows a ten day time period plus eight days advance notice would seem to be clearly unreasonable.<sup>110</sup> The remaining twenty states have enacted no provision at all governing the time for appeal and presumably would be governed by independent standards of "reasonableness." In the final analysis, there seems to be substantial compliance with the federal provision; most states, either specifically or by implication, implement the federal standard.

*G. Complaint and Adjustment Procedure—The Advance Notice Provision.*

The federal hearing regulations emphasize the necessity of implementation by the states of detailed complaint and adjustment procedures by which the claimant can seek a review of his situation at the county or local level short of a formal appeal to the state agency.<sup>111</sup> The regulations specify that these adjustment procedures, "whereby corrective action may be easily requested and readily taken without the need of a hearing, are necessary."<sup>112</sup>

As a necessary adjunct to the adjustment procedures, recent federal regulations have added the requirement that "the recipient is to be

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109. This is based on the fact that the claimant should be afforded sufficient time to consult with an attorney or other advisor in order to determine the appropriate course of action.

110. TENNESSEE PUBLIC WELFARE MANUAL, vol. II, ch. VIII, Fair Hearings, Time Limit for Filing an Appeal (1968).

111. HANDBOOK pt. IV, 6400(a). The regulation provides that:

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative decisions on the part of workers, as compared to decisions based on nondebatable facts (such as receipt OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

112. *Id.*

given *advance notice* of questions the agency has about his eligibility”<sup>113</sup> so that he has an opportunity to discuss his situation before receiving formal notice of reduction in payments or termination of assistance. The advance notice requirements are part of a general recognition by the federal agency that where questions of eligibility requirements or factors requiring evaluative decisions by workers are involved, there should be an opportunity for advance review of those decisions, with the participation of the claimant, prior to any final action which affects his receipt of assistance. This is merely a reflection of the fact that welfare recipients are often completely dependent on welfare payments for their subsistence, and agency action taken prior to review often works an undue hardship on the claimant. (As part of this policy, H.E.W. has also issued new regulations providing for the continuation of payments pending the fair hearing. This is discussed in sub-section Q *infra*.)

FIGURE 4—ADJUSTMENT PROCEDURE AND ADVANCE NOTICE

		States Which Comply	Insufficient Provision	No Provision	Restrictive	Undetermined
Established Complaint and Adjustment Procedures	No.	25	9	12	0	4
	%	50%	18%	24%	0	8%
Advance Notice Clause	No.	4	0	42	0	4
	%	8%	0	84%	0	8%

Twenty-five state regulations establish substantial and effective complaint procedures whereby informal adjustment of disputes can be pursued short of a formal appeal (*see* Fig. 4 *supra*). In general these states have established a designated official within each county or local office who must be available to handle complaints regarding decisions and actions of social workers, and to insure that a request for recon-

113. HANDBOOK pt. IV, 2300(d)(5) (emphasis added). In conjunction with the new regulation providing for advance notice to recipients, H.E.W. has issued new provisions permitting federal participation up to 30 days following notice to the recipient by the agency that his eligibility is in question. This additional period of time is designed to give the recipient an opportunity to present additional information or request a hearing. Handbook Transmittal No. 147 (Sept. 30, 1968).

sideration and corrective action will be handled promptly.<sup>114</sup> Although procedures vary considerably, they all clearly recognize the priority given to effective action by the localities on complaints by recipients. Other states have failed to adequately comply with the federal provision by not emphasizing the significance of a prompt and thorough review of all decisions which are called into question by recipients or applicants.<sup>115</sup> There are unfortunately, a number of states which have failed to institute any complaint or adjustment procedure short of a formal appeal.<sup>116</sup>

Of even greater significance than an established outlet for complaints, in terms of an effective fair hearing process, are the advance notice requirements of the federal regulations. Because these regulations have been in effect for only one year, it is not surprising that only four states—New York, Tennessee, Mississippi, and California—have complied with the provision by enacting advance notice procedures.<sup>117</sup> The New York regulations are detailed and complete, and should serve as a model for the states who have yet to comply. The New York Manual provides that when a social services official proposes to discontinue or suspend a grant of public assistance he must notify the recipient of his intention in writing at least seven days prior to the date of the proposed action.<sup>118</sup> The notice must advise the recipient that, if he so requests, he can have his case reviewed before the county supervisor, and will at that time be afforded an opportunity to present both written and oral evidence in defense of his position and to have the assistance of an attorney or other representative. The county super-

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114. *E.g.*, DELAWARE PUBLIC WELFARE MANUAL § 5510(1) (1968). Other state adjustment and complaint procedures provide for the reception of complaints at the state office by establishing a central complaint unit whose function is to initiate review of the decision at the local level, and to insure action on the complaint by requiring a written report from the local office indicating the action taken on the complaint. *See*, RHODE ISLAND PUBLIC ASSISTANCE SERVICE MANUAL, ch. IV, § II(B) (1969). *See also* Appendix *infra*.

115. For an example of an insufficient adjustment procedure, *see* ARIZONA PUBLIC WELFARE MANUAL §§ 3-1207 to 3-1207.1 (1965). For a list of states with insufficient provisions, *see* Appendix *infra*.

116. Those states with no provision at all are Alaska, Arkansas, California, Connecticut, Idaho, Iowa, Maryland, Massachusetts, Michigan, Nebraska, Tennessee, and Virginia. *See* Appendix *infra*.

117. CALIFORNIA DEPARTMENT OF SOCIAL WELFARE MANUAL, PSS Reg. 44-325.43 (1968); MISSISSIPPI MANUAL OF PUBLIC WELFARE vol. III, § F-6100 to 6103 (1968); NEW YORK PUBLIC ASSISTANCE MANUAL § E(2)(b) (1968); TENNESSEE PUBLIC WELFARE MANUAL vol. II, ch. VIII (1968).

118. § E(2)(b) (1968).

visor then makes a decision based on the review, but no termination or suspension can be made until he renders that decision. Should he decide adversely to the recipient, written notice, and a clear statement that the fair hearing procedure is available, is sent to the claimant.<sup>119</sup>

The advance notification clause, together with the new proposed "prior hearing" regulations (*see* sub-section Q *infra*), go far towards fulfilling the basic due process requirement, implicit in the fair hearing procedure, that no detrimental agency action will be taken until an opportunity for administrative review at all levels has been afforded the aggrieved party.

#### *H. Publication and Distribution of Hearing Procedures.*

One of the most significant aspects of the fair hearing process is the necessity that all participants, particularly the aggrieved party, be fully familiar with the procedures to be followed at the hearing. The federal regulations require that in the participating states "[h]earing procedures will be issued and publicized by the State agency for the guidance of all concerned."<sup>120</sup> In order to satisfactorily comply with this requirement the federal rules provide that the states must issue "hearing procedures . . . in the form of rules and regulations or in some other form in which they will be publicized."<sup>121</sup>

FIGURE 5—PUBLICATION OF HEARING PROCEDURES

	States Which Comply	Insufficient Provisions	No Provision at All	Restricts or Violates	Undetermined
Number of States	13	3	31	0	3
Percentage	26%	6%	62%	0	6%

119. *Id.* Only the local administrator is competent to undertake the review.

120. HANDBOOK pt. IV, 6200(e).

121. *Id.* 6300(i). In giving guidance to the states with regard to compliance with this provision, the HANDBOOK states that:

The publication of hearing procedures in the form of rules and regulations or in a clearly stated pamphlet helps to emphasize the importance of the procedure. The material is useful to applicants and recipients or to others interested in their behalf. It contributes to the fairness of the hearing procedure, and emphasizes that there is "due process" in program administration affecting the right to public assistance.

*Id.* 6400(b).

The clear intent of these provisions is that the states should establish detailed rules of procedure governing the conduct of the hearing, and then publish these rules to enable all interested parties and their representatives to become familiar with the established procedure well in advance of the hearing itself.

An analysis of the state hearing regulations indicate that fewer than one-third of the states have promulgated and issued hearing procedures which fully comply with federal requirements,<sup>122</sup> and only a handful of others have any such rules at all.<sup>123</sup> Of the states which have complied with the federal rules, a few have established detailed and exhaustive procedures sufficient to serve as points of reference during, and prior to, the conduct of the hearing. An example of this kind of procedure is found in the Wyoming regulations which provide established policy governing pre-hearing procedures, motions, continuances, stipulations, default, order of proceedings during the hearing, authority of the hearing officer, introduction of evidence, witnesses, subpoenas, depositions, exhibits and findings of fact, and conclusions of law.<sup>124</sup> The effect of this detailed procedure is to transform the hearing from an informal "review" into a formal "adjudication" of the recipient's rights. Formal procedures have been criticized on the grounds that they do not materially aid the welfare recipient.<sup>125</sup> The reaction of those who have participated in welfare hearings in states which have failed to issue formal rules of procedure, tends to refute this criticism.<sup>126</sup> One of the central problems confronting attorneys representing welfare recipients is the lack of rules of procedure to govern the proceedings.<sup>127</sup> Because of this omission, neither the claimant nor his representative has any way of knowing such fundamental questions as who has the burden of proof, and the burden of going forward with the evidence, and what evidence is relevant and what is not.<sup>128</sup> The proceeding, in the absence of established rules, has been character-

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122. See Appendix *infra*.

123. Arkansas, Delaware and Indiana have established a basic outline of procedure but their outlines are incomplete or insufficiently publicized to be of any use to claimants or their representatives. ARKANSAS DEPARTMENT OF PUBLIC WELFARE MANUAL § 6340 (1968); DELAWARE PUBLIC WELFARE MANUAL § 5830 (1967); INDIANA PUBLIC ASSISTANCE MANUAL ch. XIII-1, § II(b) (1963).

124. WYOMING PUBLIC WELFARE MANUAL vol. I, §§ 554.4 to 556 (1968).

125. Handler, *supra* note 45, at 170.

126. See Appendix *infra*.

127. Interview with George Stewart, Attorney, Legal Aid Clinic, Ann Arbor, Michigan, Feb. 10, 1969.

128. *Id.*

ized as "incredibly informal to the point where the whole process is chaos. . . . Everyone talks at once, facts and opinions get mixed up, everyone talks from hearsay, makes judgments, etc. . . . It is impossible to understand how, from all that confusion, . . . a record can be produced on which the hearing officer can base his decision."<sup>129</sup>

It is only too clear from this evidence that without published rules of procedure, an informal hearing can result in substantial confusion. The fact that informality may place less pressure on the unrepresented claimant does not excuse the states' failure to comply with the requirements of the federal department which has reached a different conclusion. In an attempt to remedy this omission, class mandamus actions have already been brought in several jurisdictions to require the state Department of Social Welfare to publish well defined hearing procedures.<sup>130</sup> Although these suits have yet to be resolved, they serve to point out the growing awareness of the significance of established procedure in the hearing process.

### *I. The Prior Examination of Documents.*

A fundamental principle of the administrative fair hearing is that the aggrieved individual should have the right to be informed of the nature and content of the documents to be introduced in support of the decision from which he is appealing. In recognizing this principle the federal regulations require the states to insure that "[t]he claimant or his representative have adequate opportunity to examine material that will be introduced as evidence *prior to the hearing* as well as during the hearing. . . ." <sup>131</sup> The purpose of this requirement is clear—to make available to the claimant in a welfare hearing the same kind of "discovery" procedures available to parties in a civil suit. Unfortunately, the lack of interpretive provisions explaining the nature of the requirement has led to questions concerning the extent of this right at the state level.

The central failing of the state hearing regulations with respect to prior examination is the absence of any provision affording the claimant the right to inspect official documents that will be introduced in evi-

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129. *Id.*

130. *E.g.*, *Royal v. Wyman*, Civil No. 3237 (S.D.N.Y., filed Aug. 6, 1968); *Soto v. Wyman*, Civil No. M-5213 (App. Div. N.Y., appeal dismissed Sept. 24, 1968).

131. *HANDBOOK* pt. IV 6300(n) (emphasis added).

FIGURE 6—PRIOR EXAMINATION OF DOCUMENTS

	States Which Comply	Insufficient Provision	No Provision at All	Arguably Restrictive	Undetermined
Number of States	10	8	25	4	3
Percentage	20%	16%	50%	8%	6%

dence by the local office.<sup>132</sup> (See Fig. 6 *supra*.) Although it is impossible to determine the nature of the policy followed in those jurisdictions in the absence of state regulation, evidence indicates that the general practice is to prohibit the claimant from having access to the case record, and other documents, which are either directly introduced into evidence or form the basis of materials later introduced.<sup>133</sup> All the states follow the practice of requiring the local or county office to prepare a report or summary of the facts which is sent to the hearing officer prior to the decision, and generally introduced into the record. In those jurisdictions where there is no prior examination requirement, presumably the claimant is unable to examine this report.<sup>134</sup>

In addition to the states with no provision, a number restrict the right of prior examination by specific regulation. This usually takes the form of a provision denying the claimant access to the case record and related materials. Whether this constitutes a violation of the federal requirements is not clear, since these states also provide that the case record is not to be introduced into evidence at the hearing.<sup>135</sup> If not a technical violation, these practices amount to a violation of the spirit of the federal regulations because, in practice, the state agency, though abstaining from formally introducing the case record in the hearing,

132. For a list of states which make no provision for prior examination of evidence, see Appendix *infra*.

133. Interview, *supra* note 127.

"One big problem with the hearing process in Michigan is that the Department will not allow attorneys to see the client's file before the hearing. We have little or no response or co-operation from the state even with regard to the federal requirements of free access. Once we get a case we send the State department a letter requesting to see the records and citing the federal regulations on behalf of our claim. The response is always negative. They take the position that the case records are confidential, and continue to hold that position in spite of what I regard as the clear commands of the federal manual."

134. *Id.*

135. *E.g.*, ALABAMA PUBLIC WELFARE MANUAL pt. I, § II(I) (B) (4) (1968).

relies instead on the testimony of a caseworker who often reads from a record which is not introduced, and hence unavailable to the recipient.<sup>136</sup> Although mandamus actions have been filed asserting that this practice violates the federal regulations,<sup>137</sup> H.E.W. has yet to issue further interpretations of this provision.

There are, however, at least ten states which have provisions that appear to be in substantial compliance with federal law.<sup>138</sup> Generally, these provisions simply reiterate the federal requirements without any further interpretation.<sup>139</sup> However, a few states have provisions sufficiently explicit to cover the case record problem. For example, the Massachusetts manual provides that "[t]he appellant or his representative must be afforded the right to see that part of *any written material*—budget, worksheet, medical data or the Appeal Case Summary Forms—based on the issues involved. . . ." <sup>140</sup> In order for the prior hearing requirements to serve as an effective means of affording the claimant an adequate opportunity to prepare his case, the state provisions should at least equal this standard.

### *J. The Prohibition of Non-Record Information.*

Related to the previous provision concerning prior examination of documents, but designed to reach a different problem, is the federal regulation governing non-record communication between the local agency and the hearing authority. The regulations provide that:

Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case records or other ma-

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136. *The Right to a Fair Hearing: Improvements and Problems*, 13 WELFARE L. BULL. 10, 11 (1968).

137. *Napper v. Wyman*, Civil No. 65035/68 (Sup. Ct. N.Y., dismissed April 22, 1968); *Rodriguez v. Wyman*, Civil No. 20997 (App. Div. N.Y. April 5, 1968); *Pagan v. Wyman*, Civil No. 05704 (App. Div. N.Y., filed April 5, 1968); *Soto v. Wyman* Civil No. 5731 (App. Div. N.Y., dismissed April 22, 1968); *Reeves v. Wyman*, Civil No. 20997 (App. Div. N.Y., filed Dec. 29, 1967).

138. Appendix *infra*.

139. CONNECTICUT PUBLIC ASSISTANCE MANUAL vol. I, 6300(15) (1968); HAWAII PUBLIC WELFARE MANUAL § 2503(3)(d) (1968).

140. MASSACHUSETTS PUBLIC ASSISTANCE POLICY MANUAL ch. VI, § C(1)(b) (1968) (emphasis added).



terial prior to the hearing unless such material is made available to the claimant or his representative.<sup>141</sup>

The clear intent of this provision is to prevent evidence, which the claimant does not have an opportunity to rebut, from being used, either directly or indirectly, in the decision-making process. It is specifically designed to prevent the practice, prevalent in some jurisdictions, of having the local or county office send a report of the "facts" of the case to the hearing officer prior to the hearing. The regulation does not prevent such reports per se, but it does require that they also be made available to the claimant.

FIGURE 7—NON-RECORD INFORMATION

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	16	3	22	5	4
Percentage	32%	6%	44%	10%	8%

Examination of the state hearing regulations reveals that only one-third of the states have provisions regarding non-record or confidential information which comply with the federal requirements.<sup>142</sup> In general, these provisions are relatively uncomplicated, simply requiring that "any material, including the case record, which is reviewed by the Hearing Officer prior to the hearing is also made available to the appellant or his representative."<sup>143</sup>

In spite of the fact that compliance with this provision requires merely a simple policy determination, twenty-two states<sup>144</sup> have no provision prohibiting secret reports, and five states<sup>145</sup> go so far as to explicitly or implicitly accept them. An example of the latter type of provision can be found in the Michigan Manual which provides that "[a]fter study of the county bureau's report, if the referee finds that additional information

141. HANDBOOK pt. IV., 6300(o). This provision is relatively new, having been added for the first time Feb. 8, 1968.

142. For a list of complying states, see Appendix *infra*.

143. COLORADO PUBLIC ASSISTANCE MANUAL § 4724.012 (1968). See also RHODE ISLAND PUBLIC ASSISTANCE SERVICE MANUAL ch. IV, § VI(c) (1969). "... [T]he Hearing officer will not review any information that is not made available to the applicant or recipient or his representative(s)."

144. See Appendix *infra* for a list of states with no provision.

145. *Id.*

is necessary, he will arrange to review the case record at the bureau in advance of the hearing.”<sup>146</sup> This provision, combined with the fact that in Michigan the claimant or his representative is not permitted access to the case record,<sup>147</sup> seems a clear violation of the federal provision and represents the type of practice which the federal rules are designed to prevent.

### K. *The Convenience of Claimant Clause.*

The welfare recipient typically has limited means available to meet any expense incurred in attending the hearing. Furthermore, if disabled or aged, his mobility may be severely restricted. In order to prevent this fact from interfering with the free exercise of his hearing rights, the *Handbook* requires that “[t]he hearing will be conducted at a time, date and place convenient to the claimant, and adequate preliminary written notice will be given.”<sup>148</sup> This requirement is not satisfied simply by attempting to schedule the hearing at a time and place amenable to the recipient. The regulations insure that the state agency recognize that “it has not discharged its responsibility for a hearing unless it has taken all steps necessary to enable a claimant who requested a hearing to attend the hearing in person or to be represented by a person of his own choosing.”<sup>149</sup> If the hearing is to be held at any distance from the claimant’s residence, the states are under an obligation “to provide for the transportation and other costs of the claimant, his representative, and his witnesses.”<sup>150</sup>

The thrust of these requirements is that no hearing shall be delayed or canceled because the claimant is not able to incur the financial expense necessary to attend. It is part of the total design of the federal rules, to make the hearing process fully accessible to all.

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146. MICHIGAN MANUAL OF SOCIAL SERVICES pt. H, § 386 (1949).

147. Interview, *supra* notes 127, 133.

148. HANDBOOK pt. IV, 6200(g). This requirement is further emphasized in 6300(1) which provides:

The convenience of the claimant is considered in setting the date, time, and place for the hearing. Notice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of his case. He is advised as to the use of witnesses and legal counsel or other representative, as well as any procedure or financial provisions for obtaining legal representation, including availability of fees for legal counsel from the agency.

149. *Id.* 6400(d).

150. *Id.*

FIGURE 8—CONVENIENCE CLAUSE

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	31	7	9	0	3
Percentage	62%	14%	18%	0	6%

Almost two-thirds of the states have provisions which require that the convenience of the claimant be considered in setting the date, time, and place of the hearing, and, if necessary, holding the hearing in the claimant's home.<sup>151</sup> A number of states make some provision for consideration of the claimant's needs in scheduling the hearing, but fail to fully comply with the federal regulations in one or more significant respects. In most of these jurisdictions, the main difficulty is a failure to provide for transportation expenses for the claimant, his representative, and witnesses.<sup>152</sup>

There are a few states which have enacted no regulations providing for the convenience of the appellant in scheduling and conducting the hearing.<sup>153</sup> Although, in the absence of any regulation, the actual practice in these jurisdictions remains unascertained, in at least one of these states a mandamus action has been filed against the state agency by recipients who contend that they are prejudiced by the failure of the hearing regulations to provide for advance reimbursement for transportation expenses, or that the hearing be held in a convenient location.<sup>154</sup>

The convenience clause is perhaps not the most crucial clause to an effective fair hearing process; nevertheless, compliance is a significant aspect of the state's attitude toward its fair hearing procedure. It is a basis for some optimism, therefore, that compliance, though far from unanimous, at least encompasses a large majority of the participating states.

#### *L. Independent Medical Assessment Requirement.*

Not infrequently it is necessary to resolve the issue of the claimant's

151. *E.g.*, RHODE ISLAND PUBLIC ASSISTANCE SERVICE MANUAL ch. III, § V(1) (1969). For a list of complying states, see Appendix *infra*.

152. *E.g.*, NORTH DAKOTA SOCIAL WORK MANUAL ch. 361, § 4, par. 3 (1952). For a list of states with insufficient provisions, see Appendix *infra*.

153. See Appendix *infra*.

154. *Royal v. Wyman*, Civil No. 3237 (S.D. N.Y., filed Aug. 6, 1968).

medical or physical status. Previous practice allowed the state agency's medical personnel to render all these judgments which, because of financial inability, the claimant was unable to refute. The federal agency, eventually realizing the injustice of this procedure, promulgated a new regulation providing that:

When the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer *or the appellant* considers it necessary.<sup>155</sup>

The regulations require that if such an independent medical assessment is requested by the claimant it is to be obtained, at the expense of the state agency, from a medical source considered satisfactory by the claimant.<sup>156</sup> Though perhaps not crucial to the hearing process because of its limited application, the medical assessment provision is yet another example of the emphasis of the federal rules upon insuring that no claimant is to be denied a fair hearing simply because he lacks the necessary means to provide an adequate presentation of his case.

FIGURE 9—INDEPENDENT MEDICAL ASSESSMENT

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	23	1	22	0	4
Percentage	46%	2%	44%	0	8%

In view of the fact that this regulation has been effective for only a short time, it is perhaps understandable that about half of the states have failed to implement the requirement.<sup>157</sup> This does raise the ques-

155. HANDBOOK pt. IV, 6200(h) (emphasis added). This regulation was incorporated in the 1968 revisions in Feb. 8, 1968.

156. *Id.* 6300(m).

The hearing officer can also consider the physician's report in the record or can request additional evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record.

157. For a list of states with no provision for an independent medical assessment, see Appendix *infra*.

tion, however, of the serious time lapse between the promulgation of new regulations by the federal agency and their eventual implementation by the states.

There has been affirmative action, however, by twenty-three of the participating states,<sup>158</sup> whose provisions generally follow the federal requirements closely. The question still remains as to the efficacy of the medical assessment provision in view of the fact that the federal rules do not require that notice of this right be given claimants. In the absence of some form of notification, the existence of a regulation which relies on the specific request of the appellant before it is operative is of dubious benefit to the aggrieved individual who is often unaware of his right to make such a demand. It is clear that future federal regulations must provide for notification to the claimant that an independent medical assessment can be secured, and the expense borne by the state agency.

#### *M. Withdrawal and Abandonment of Hearing Requests.*

If the state agency has established effective informal complaint and adjustment procedures a satisfactory resolution of the dispute may occur short of the formal hearing. If the necessary safeguards are observed, this can be a desirable aspect of the hearing process, saving time and effort on both sides. The federal rules recognize, however, that unless provisions in the regulations clearly establish the proper agency action, undue pressures may be brought on the claimant to agree to an adjustment even though unfavorable in his position, and to withdraw his request for a hearing.<sup>159</sup> To protect the claimant's rights in this regard the *Handbook* provides that "[t]he agency does not deny or dismiss a request for a hearing except where it has been withdrawn by the claimant in writing or abandoned."<sup>160</sup> To insure that the states are fully aware of the underlying reason for the withdrawal pro-

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158. The majority of these states have enacted provisions similar to that found in the RHODE ISLAND PUBLIC ASSISTANCE SERVICE MANUAL ch. IV, § VI(E) (1969):

When the hearing involves medical issues and the Hearing Officer and/or the applicant or recipient considers it necessary, a medical assessment other than that of the person or persons involved in the original decision will be obtained, will be made part of the hearing record and will, *if requested by the applicant or recipient* be obtained at agency expense. (emphasis added).

For a list of states with provisions substantially complying with the HANDBOOK, see Appendix *infra*.

159. HANDBOOK pt. IV, 6400(a). "[T]he State and local agency adjustment procedures cannot be allowed to interfere with the hearing process."

160. *Id.* 6300(f).

vision, the regulations emphasize that, since every aggrieved claimant is entitled to a full opportunity for a fair hearing, only he can withdraw his request, and such withdrawal must be in writing.<sup>161</sup>

The abandonment provisions of the federal requirements are designed to meet a different problem, specifically, where the claimant fails to appear at the scheduled time and place of the hearing. To insure that the claimant's opportunity for a hearing is not denied simply through oversight or unavoidable circumstance, the regulations provide that a request is considered abandoned

only if neither the claimant nor his representative appears at the time and place agreed upon for the hearing *and if within a reasonable time after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing, no reply is received by either the local or state agency.*<sup>162</sup>

The requirements of the latter part of this regulation are twofold: 1) the agency must give the claimant a reasonable time, following failure to appear, to indicate a desire to continue; and 2) the initiative in this regard must remain with the state agency and not the claimant. Together these two provisions serve to implement the fundamental federal policy that the fair hearing procedures are to "assure the right of every claimant to demand and obtain a fair hearing [which right] is not to be limited or interfered with in any way."<sup>163</sup>

Only a few of the participating states have no provision regarding withdrawal or abandonment of hearing requests,<sup>164</sup> and nearly two-thirds have regulations which substantially comply with the federal

FIGURE 10—WITHDRAWAL AND ABANDONMENT PROCEDURES

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	33	4	5	4	4
Percentage	66%	8%	10%	8%	8%

161. *Id.* 6400(a).

162. *Id.* 6300(f) (emphasis added).

163. *Id.* 6400(a).

164. California, Colorado, Hawaii, Idaho and Montana have no provision for withdrawal or abandonment. See Appendix *infra*.

requirements.<sup>165</sup> (See Fig. 10 *supra*.) However, a significant percentage of the state regulations are either insufficient, and do not fully comply with the federal rules, or have express provisions which violate or restrict the application of the rights granted to claimants under federal policy. Of those states with insufficient provisions,<sup>166</sup> the most common omissions are either a failure to require that a withdrawal must be in writing to be effective, or to provide for an inquiry following the claimant's failure to appear at the scheduled time for the hearing.<sup>167</sup> More serious, of course, are the provisions of those states which directly violate the federal requirements.<sup>168</sup> For example, the Florida regulations provide that if the claimant makes known his "desire to withdraw" but does not reduce this to a written request, "the Hearing Officer will write a letter to the client explaining that unless the agency is informed to the contrary within a given time, it will be assumed that the request is withdrawn."<sup>169</sup> By themselves, these and similar provisions may not seem a serious violation of federal requirements, but, in fact, they permit the kind of local agency pressure that the federal regulations are specifically designed to prohibit.

#### *N. The Conduct of the Hearing—Due Process and the Rights of Claimants.*

Equally as important as those provisions which provide for the protection and preservation of the claimant's rights prior to the hearing, are the provisions governing the procedure to be employed during the conduct of the hearing itself. In addition to insuring that the claimant's opportunity to employ the hearing process is not impaired in any way, the federal regulations are also designed to provide for a full and impartial review of the case at the hearing. In an attempt to implement this

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165. An example of complete and detailed withdrawal and abandonment regulations can be found in the ALABAMA PUBLIC WELFARE MANUAL pt. I, §§ II, I(B)4, I(C) (1968) providing for written withdrawal, stating the reasons therefore based on the claimant's own decision, and a 20 day period after the making of an inquiry before an appeal is considered abandoned.

For a list of states whose provisions comply with the HANDBOOK, see Appendix *infra*.

166. See Appendix *infra*.

167. E.g., as to the first omission: ILLINOIS CATEGORICAL ASSISTANCE MANUAL Rule 1.08 (1963).

168. See Appendix *infra*.

169. FLORIDA MANUAL OF PUBLIC WELFARE ch. 100, § V (1967). For an example of a restrictive abandonment procedure, see ARIZONA PUBLIC WELFARE MANUAL § 3-1207.2(E) (1967) which provides that "[i]f the applicant does not appear for the hearing and cannot show good cause for being absent the appeal shall be dismissed."

policy, the regulations provide that during the conduct of the hearing the claimant or his representative will have the opportunity.

- 1) to examine all documents and records used at the hearing;
- 2) at his option, to present his case himself or with the aid of others including legal counsel;
- 3) to bring witnesses;
- 4) to establish all pertinent facts and circumstances;
- 5) to advance any arguments without undue interference; and
- 6) to question or refute any testimony or evidence.<sup>170</sup>

That these specific requirements are intended to be inclusive is demonstrated by the fact that, although the hearing is conducted in an informal court-type procedure, it is nonetheless "*subject to the requirements of due process.*"<sup>171</sup>

Besides requiring that the claimant be afforded such standard procedural due process rights as the right to confrontation and cross-examination,<sup>172</sup> the due process provision also seems to require the state agency to establish procedures governing the admissibility of relevant evidence, prohibition of hearsay testimony, and the nature of proof required by the claimant in order to prevail.<sup>173</sup> Whether or not the due process requirement compels a state to enact specific substantive provisions covering these issues, it at least would seem to require that the state provide some well-defined procedures so that consistent rulings on these questions can be made by the hearing officer. Admitting for the moment that the interpretation of this provision is open to question, and that states may differ in their interpretation of the specific enactments required, it is clear that the federal regulations require the states to recognize due process rights in welfare hearings.

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170. HANDBOOK pt. IV, 6200(i).

171. *Id.* 6400(a) (emphasis added). The HANDBOOK attempts to make clear that the claimant must be provided considerable latitude in the presentation of his case. The procedure provides:

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel . . . . Furthermore, the claimant may bring witnesses if he desires to help him establish pertinent facts and to explain his circumstances.

172. See generally Note, *Right to Counsel in Public Welfare Hearings*, 48 BOSTON U.L. REV. 468, 476-86 (1968).

173. Interview, *supra* note 127.



FIGURE 11—PROCEDURE DURING THE HEARING

		States Which Comply	Insufficient Provisions	No Provision at All	Violates or Restricts	Unde- termined
Express Federal Procedural Provisions	No. of States	38	6	2	0	4
	%	76%	12%	4%	0	8%
"Due Process" Provision	No. of States	7	0	40	0	3
	%	14%	0	80%	0	6%

Since the express federal requirements concerning the rights of claimants establish only a minimum standard for the states to follow, it is not surprising that over three-fourths of the states have provisions guaranteeing these basic rights at the hearing.<sup>174</sup> A handful of states have either no provision at all<sup>175</sup> or regulations which fail to specify one or more of the federal minimum guarantees.<sup>176</sup>

However, when the focus turns to a question of extending the protection of the claimant beyond this minimum—the right to inspect documents, the right to counsel, the right to introduce as well as confront witnesses, and the right to establish facts, advance arguments, and refute testimony—the state regulations are seriously deficient. Only seven states specifically recognize in their regulations that the hearings are subject to the requirements of due process,<sup>177</sup> and an even smaller number have seriously attempted to implement this requirement by enacting detailed provisions governing the conduct of the hearing, and controlling the discretionary authority of the hearing officer and the state agency. Of the latter states the most outstanding example is Washington<sup>178</sup> which establishes in sufficient detail: the authority of the hearing officer to take official notice of matters of law and material facts;<sup>179</sup> the right of the

174. For the most part, these provisions merely reiterate the federal requirements without making any attempt to provide guide lines for the official conducting the hearing. For a list of states which comply with the minimum requirement, see Appendix *infra*.

175. *Id.*

176. *Id.*

177. Alaska, Maine, Minnesota, New Jersey, New Mexico, Tennessee and Texas have provisions which reiterate the phrase that the "hearing is subject to the requirements of due process." See Appendix *infra*.

178. WASHINGTON PUBLIC ASSISTANCE MANUAL II, ch. 388-08-150 to -500 (1968).

179. *Id.* ch. 388-08-375.

claimant to subpoena witnesses;<sup>180</sup> the right of the claimant to take depositions, and submit interrogatories;<sup>181</sup> the presumptions of law that are operable during the hearing;<sup>182</sup> the right of the claimant to agree to stipulations and admissions of fact;<sup>183</sup> the right of the claimant to submit documentary evidence in advance of the hearing;<sup>184</sup> the right of the claimant to produce expert or opinion testimony;<sup>185</sup> and rules of evidence designed to protect the rights of all parties.<sup>186</sup>

These procedures serve to protect the rights of all claimants by preventing arbitrary action on the part of the hearing authority,<sup>187</sup> and by insuring that standard and uniform policies will be followed in each case as required by the standards of due process.

#### *O. The Impartial Hearing Officer and Hearing Authority.*

One of the fundamental requirements of due process in administrative hearing procedure is that the hearing officer charged with conducting the hearing must be impartial, and removed from the decision being appealed.<sup>188</sup> This requirement, though basic, is often difficult to achieve in actual practice. In those states which cannot afford a full-time staff of hearing officers whose sole function is to preside over welfare appeals, the designated hearing officer is frequently quite familiar with the questioned agency action prior to the institution of an appeal. The federal regulations, recognizing the existence of this potential conflict, have promulgated specific, mandatory regulations designed to prevent it. The *Handbook* provides that "[t]he hearing will be conducted by an impartial official (or officials) of the State agency."<sup>189</sup> The regulations interpret this provision as requiring that:

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180. *Id.* ch. 388-08-150, -160, -170, -180, -190, -200, -210, -220.

181. *Id.* ch. 388-08-230.

182. *Id.* ch. 388-08-390.

183. *Id.* ch. 388-08-400.

184. *Id.* ch. 388-08-450.

185. *Id.* ch. 388-08-470.

186. *Id.* ch. 388-08-520.

187. There is some evidence that due process is not guaranteed merely by a provision complying with the express federal standards. A mandamus action has been brought by welfare recipients in New York, which does comply with these standards, alleging failure of the state department to adequately provide petitioners an opportunity to examine pertinent records, and to cross-examine and refute testimony of opposition witnesses, and the right to advance "arguments without undue interference." *Royal v. Wyman*, Civil No. 3237 (S.D. N.Y., filed Aug. 6, 1968).

188. Administrative Procedure Act § 7, 5 U.S.C. § 1007 (1964). "The functions of all presiding officers . . . shall be conducted in an impartial manner."

189. *HANDBOOK* pt. IV, 6200(d).

The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made. For example, a field supervisor who has advised the local agency in the handling of a case would be disqualified from acting as the hearing officer.<sup>190</sup>

The necessity for a truly impartial hearing officer is strongly emphasized by the federal regulations. Because these rules permit the states to separate the function of hearing officer and final hearing authority, there are additional provisions designed to insure that the hearing authority will have had no previous participation in the decision. The federal regulations provide that the hearing authority may be either the highest executive officer of the state agency, or a panel of agency officials, or a hearing officer appointed for that purpose, but that "no person who participated in the local decision being appealed will participate in a final administrative decision on such case."<sup>191</sup>

The clear intent of these provisions is that the hearing authority shall not have been directly or indirectly connected with the agency action which the claimant is appealing.<sup>192</sup> Although this provision may be

FIGURE 12—IMPARTIAL HEARING AUTHORITY

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	21	9	17	0	3
Percentage	42%	18%	34%	0	6%

190. *Id.* 6400(e). Note also that this interpretation is reiterated elsewhere in the federal regulations, lending credence to the view that it is intended to be given substantial emphasis. "The impartial official (or officials) of the State agency who is responsible for conducting the hearing [cannot be] involved in any way with the action in question." *Id.* 6300(h).

191. *Id.* 6300(g).

192. The regulations specify the kind of practices which are prohibited and those which are permissible. HANDBOOK pt. IV, 6400(f) provides:

[A] state board member who has participated as a county board member or in another capacity in the local action on a case [should] disqualify himself from rendering a final decision on the particular case. This does not preclude the State director or administrative board from signing the decision in the name of the State agency, even though previously involved in the case.

difficult to fulfill in some jurisdictions, the mandatory requirement is clear, and compliance by the states is necessary.

Less than one half of the states administering public assistance have regulations which insure that the hearing officer and final authority will be impartial, and removed from the decision under appeal. (See Fig. 12 *supra*.) The remaining states either have no provision at all or have provisions which do not meet the standards prescribed by the federal rules.

Those states which comply with the federal rules<sup>193</sup> have similar provisions establishing the basic requirement that hearings be conducted by an impartial official of the state agency, and providing interpretative regulations which provide that no person who has participated in the decision being appealed can participate in the conduct of the hearing or in the final administrative decision.<sup>194</sup> The nine states with insufficient provisions have varying regulations governing the hearing authority. A typical example is the Arizona regulation which provides that any person designated as the hearing officer "may disqualify himself on an individual appeal if in his opinion prior knowledge of the case might prejudice him in his conduct of the hearing."<sup>195</sup> Common to all these regulations is the omission of a mandatory requirement that the hearing officer be impartial, and provisions for his removal if he has prejudicial prior knowledge. There is a significantly large number of states whose regulations by ignoring the federal mandate, have failed to insure impartiality in the conduct of the hearing and the final administrative decision.

#### *P. Exclusive Record Clause.*

Because the federal regulations permit the states to separate the functions of hearing officer and final hearing authority, it is necessary to make sure that the hearing process will not be subject to external pressures and influence between the hearing and the rendering of the final decision. To insure that information not presented at the hearing does not become available to the final hearing authority, the federal regulations provide that "[t]he hearing officer's (or panel's) recommendations shall be based exclusively on evidence and other material intro-

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193. For a list of states which comply with the impartial hearing officer requirement, see Appendix *infra*.

194. E.g., CONNECTICUT PUBLIC ASSISTANCE MANUAL vol. I, §§ 6300(7), 6400(4) (1968).

195. ARIZONA MANUAL OF PUBLIC WELFARE § 3-1207.3(A) (1967) (emphasis added).

duced at the hearing."<sup>196</sup> The regulations specify in some detail what constitutes the only information available to the decision making authority. The *Handbook* states:

The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the hearing officer's or panel's recommendations will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.<sup>197</sup>

The provision specifically prohibits the hearing authority from having access to any secret report prepared by the county department or the hearing officer himself. The decision must be based solely on the record of the hearing, and the hearing officer's recommendations, and both of these must be made available to the claimant if he requests them.

FIGURE 13—EXCLUSIVE RECORD CLAUSE

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	17	9	20	0	4
Percentage	34%	18%	40%	0	8%

Although compliance with this provision is necessary to the preservation of due process in the welfare hearing, only one-third of the states have enacted regulations which specify that the hearing authority will have available for its decision only the exclusive record of the case which is also made available to the claimant.<sup>198</sup> The remainder either have provisions which do not prohibit other information from being used by the hearing authority,<sup>199</sup> or have no regulation at all governing the record for decision.<sup>200</sup>

196. HANDBOOK pt. IV, 6200(1). The exclusive record requirement is a new one in the federal procedure. It was first required for the states on Feb. 8, 1968.

197. *Id.*

198. For a list of states which sufficiently comply with the exclusive record clause, see Appendix *infra*.

199. *Id.*

200. *Id.*

The fact that only a few states comply with this provision does not, in itself, demonstrate that the final decision by the hearing authority is based on information other than that introduced at the hearing. However, unless a state has such a provision, the opportunity will remain for the decisional authority to obtain a more complete explanation of any questions or issues raised during the hearing from the hearing officer or the local office.<sup>201</sup>

#### *Q. Retroactive Payments and the Prior Hearing Regulation.*

It has become well established in both state and federal administrative procedure that due process requires that notice, and an opportunity for a hearing, be afforded an aggrieved individual *prior to effective* adjudicative decision.<sup>202</sup> However, until recently the federal hearing regulations were silent as to the time that the hearing had to be held. The only federal provision regarding action prior to a hearing specifically condoned a prior termination by specifying that payments retroactive to the date the incorrect action was taken had to be made in cases where there was a decision in favor of the claimant.<sup>203</sup> It is not surprising, therefore, that the universal practice in all states is for the local agency to terminate aid by *ex parte* decision, and then, after notifying the claimant of the termination, to inform him that the administrative hearing process is available.

The fact that all states terminate assistance prior to the hearing, and that the federal regulations required only that retroactive payments be

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201. In Michigan, a state with no exclusive record provision, the hearing authority contacts local officials in order to clear up points of confusion in relation to the record or testimony. It is exactly this kind of seemingly innocuous extra-record communication that the federal regulations are designed to prohibit. Interview, *supra* note 127.

202. Where the regulatory statute is silent on the question of a prior hearing, and the proposed agency action involved substantial deprivation, federal courts have held that due process requires a prior hearing. *E.g.*, *CAB v. Delta Airlines, Inc.*, 367 U.S. 316 (1961); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950); *United States v. Illinois Central R.R.*, 291 U.S. 457 (1934); *Japanese Immigrant Case*, 189 U.S. 86, 99-101 (1903); *Standard Airlines v. CAB*, 177 F.2d 18 (D.C. Cir. 1949).

The trend in state law has been similar. *E.g.*, *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963); *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959); *Bechler v. Parsekian*, 36 N.J. 242, 176 A.2d 470 (1961); *Texas Dep't Pub. Safety v. Hamilton*, 304 S.W.2d 719 (Tex. Civ. App.), *aff'd per curiam*, 306 S.W.2d 712 (Tex. 1957).

203. *HANDBOOK* pt. IV, 6300(g). This provision as to retroactive payments is relatively new, having been first transmitted to the states in 1968. Prior to this, the federal procedure required only that the states provide payments up to 2 months before the hearing decision regardless of the actual amount of time involved. *See HANDBOOK* pt. IV, 6400(i) (Sept. 9, 1965).

made, led to a number of challenges of the practice on due process grounds.<sup>204</sup> Partially in response to these actions, H.E.W. promulgated regulations making federal participation available for "payments or assistance continued pending a hearing decision."<sup>205</sup> It was not, however, until a New York District Court in *Kelly v. Wyman*<sup>206</sup> ruled that such practice was unconstitutional that definitive action was taken by the federal agency toward providing the protection already available in other administrative agencies. In *Kelly* the court held that "due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result."<sup>207</sup> Subsequent to this decision, H.E.W. issued, in November, 1968, a proposed regulation<sup>208</sup> providing that:

When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, *assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached.*<sup>209</sup>

The new regulation which became effective on July 1, 1969, amounts to a clear recognition by the federal agency that the fair hearing requirement cannot be truly effective if persons are deprived of the necessities of life while awaiting the hearing.

Though perhaps not broad enough to cover all cases in which respondents are entitled to a hearing, the regulation is sufficiently in-

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204. Among those challenges filed in various states are: *Wheeler v. Montgomery*, No. 48303 (N.D. Cal., April 19, 1968); *McCullough v. Terzian*, No. 379011 (Sup. Ct. Cal., May 2, 1968); *Kelly v. Wyman*, Civil No. 394/68 (S.D. N.Y., May 17, 1968); *Shaefer v. Wyman*, Civil No. 864/68 (S.D. N.Y., May 17, 1968); *Williams v. Gauly*, Civil No. GC 6728 (N.D. Miss., June 9, 1967); *Lage v. Downing*, Civil No. 7-2089-C2 (S.D. Iowa, Oct. 30, 1967); *Moore v. Houston*, C.A. No. 104435 (Cir. Ct. Mich., Nov. 1, 1968); *Park v. Dawson*, Civil No. 1408 (Cir. Ct. Ky., Oct. 11, 1968).

205. HANDBOOK pt. IV, 6500(b).

206. Civil No. 394/68 (S.D. N.Y., Nov. 26, 1968).

207. *Id.* The court reached the constitutional question, rather than basing its decision on the requirement of the "fair hearing" provision of the Act, because several of the plaintiffs were receiving state "general assistance" and not federal categorical assistance. See also *Moore v. Houston*, C.A. No. 104435 (Cir. Ct. Mich., Nov. 1, 1968) where the court held that due process required a "hearing prior to cancellation of the constitutionally protected privilege of receiving aid to dependent children if eligible." But see *Park v. Dawson*, Civil No. 1408 (Cir. Ct. Ky., Oct. 11, 1968) where the court rejected the claim of a right to a prior hearing.

208. 33 Fed. Reg. 17853 (1968).

209. *Id.* (emphasis added).

clusive to encompass the great majority of appealable decisions.<sup>210</sup> The state agencies must notify a client in advance of a planned termination or reduction. If the claimant then decides to appeal, the agency must hold the hearing and render the final decision within sixty days (*see* sub-section R *infra*). During this period, until final decision is reached, the agency must continue assistance. If there are delays beyond the sixty-day period caused by agency action, illness of the recipient, or other essential reasons, payments must still be made.<sup>211</sup>

It is too early to predict whether or not the states will readily comply with the prior hearing regulation, but an analysis of the state regulations concerning the existing retroactive payments requirement may prove predictive of the future performance of the states on the more far-reaching prior hearing provision.

Less than one half of the states presently comply with the much less demanding federal requirement covering retroactive payments,<sup>212</sup> while the majority either have insufficient provisions,<sup>213</sup> no provision at all,<sup>214</sup>

FIGURE 14—RETROACTIVE PAYMENTS PROVISION

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	23	6	15	3	3
Percentage	46%	12%	30%	6%	6%

210. U.S. DEP'T OF HEW, Release No. V57 (Nov. 30, 1968). The regulation applies to disputes which arise over issues of either fact or judgment relating to the eligibility or amount of entitlement of a recipient. It seems, therefore, that it does not cover various other grounds of appeal recognized by the federal regulations, including decisions related to restricted or protective payments (HANDBOOK pt. IV, 6300(c)(3)(iii)), or conditions of payments, such as work requirements (*Id.* 6300(c)(3)(iv)). It seems broad enough to cover consideration of the agency's interpretation of the law and of agency policy promulgated thereunder, at least insofar as it relates to eligibility or amount of payment.

211. U.S. DEP'T OF HEW, Release No. V57 (Nov. 29, 1968).

212. *See* Appendix *infra* for a list of complying states.

213. In the case of those states with insufficient provisions, the main failing is that the state provisions limit the retroactive payments to the period of the two months preceding the hearing request, regardless of the amount of time that actually transpires between the date of the incorrect action and the request. *E.g.*, KENTUCKY PUBLIC ASSISTANCE MANUAL OF OPERATIONS § 4243 (1968); IOWA DEPARTMENT OF SOCIAL WELFARE MANUAL VI-13-2(3) (1966). *See* Appendix *infra*.

214. *See* Appendix *infra*.



or expressly restrict or violate the federal rule.<sup>215</sup> Because the existing retroactive payment requirements have only been in effect since February, 1968, it might be argued that the states have not had sufficient time to enact complying regulations. However, a number of states have revised their hearing requirements in the interim without enacting regulations which comply with the federal standard. In any event, many states continue to ignore the clear federal command relating to retroactive payments, and consequently, there is little reason to believe that these states will, in the near future, enact regulations to provide for a hearing prior to termination or reduction, especially in view of the fact that this requirement entails greater expense, and more detailed administrative procedures than did the former.

### *R. The Sixty-Day Rule.*

Significant before the enactment of a prior hearing regulation, and of continuing significance subsequent to its enactment, is a provision establishing some reasonable time limitation on the hearing process, from request through final administrative decision. For a long time the federal regulations relied on a requirement that the states set a reasonable and definite time limit within which the hearing had to be completed.<sup>216</sup> However, this provision did not serve to guarantee that the hearing process in the various states was completed without unreasonable delays. Consequently, H.E.W. issued revised regulations which expressly provide that "[p]rompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency. . . ." <sup>217</sup> The sixty-day time limit is not subject to permissible extensions "except that where the claimant requests a delay in the hearing in order to prepare his case or for other essential reasons, reasonable time is given and such extra time may be added to the 60 days." <sup>218</sup>

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215. Arizona, Illinois and Nevada have provisions which are in violation of the federal requirements. ARIZONA MANUAL OF PUBLIC WELFARE § 3-2107.4 (1967) provides that the state department "may order payments to be made for all or any part of the period in which the appeal was pending." (emphasis added). This clearly makes such payments discretionary with the state agency.

216. HANDBOOK pt. IV 6200(f) (Sept. 9, 1965): "Prompt, definitive, and final administrative action will be taken on every request for a hearing, including a time limit between the request for a fair hearing and the rendering of the decision."

217. HANDBOOK pt. IV, 6200(j).

218. *Id.* 6300(e).

The purpose of the sixty-day rule is to provide the assurance of "prompt, administrative action."<sup>219</sup> The regulations suggest that detailed controls of individual steps in the hearing process "such as: time limits for accepting, forwarding, and acknowledging a request for a hearing, notice to the claimant, and date of the hearing will facilitate proper administration of the hearing process."<sup>220</sup> What the rule requires of the states is beyond question. They must provide the administrative machinery necessary to process a hearing through a final and binding administrative decision within sixty days of the request. The provision is equally clear that no delays or extensions can be initiated by the state agency through pressure brought to bear, either directly or indirectly, on the claimant. The requirements are clear, and unequivocal, and compliance by the states is relatively easy to measure.

FIGURE 15—THE SIXTY-DAY RULE

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	27	3	10	7	3
Percentage	54%	6%	20%	14%	6%

Although a majority of state regulations comply with the federal sixty-day rule,<sup>221</sup> a significant number of states have insufficient provisions, no provision at all or provisions which expressly violate the federal standards. (See Fig. 15 *supra*.) Of these non-complying states, the largest number are silent as to any over-all time limit,<sup>222</sup> or have provisions which permit unauthorized extensions of the sixty-day period at the option of the state agency.<sup>223</sup> A major cause for concern, however, is the relatively large number of states whose hearing regulations spe-

219. *Id.* 6400(g).

220. *Id.*

221. See Appendix *infra*.

222. *Id.*

223. The three states with insufficient provisions are Connecticut, Illinois and Mississippi. Their common failing is the provision for unauthorized extension of the 60 day limit. E.g., ILLINOIS CATEGORICAL ASSISTANCE MANUAL § IV. art. I, Rule 1.22 (1963): "The decision of the Commission shall be rendered in writing within 60 days after the date of the filing of the appeal *unless additional time is required for a proper disposition of the appeal.*" (emphasis added).

cifically violate the federal requirements.<sup>224</sup> In most cases, the regulations in those states specify a time limit much greater than the sixty day period stipulated by the federal agency.<sup>225</sup>

The sixty-day rule plays a significant role in insuring that recipients are not denied due process in the hearing because of unreasonable delays in reaching a final decision.<sup>226</sup> Compliance by the states is essential; the fact that nearly one half of the regulations do not approach the federal standard raises more doubts about the efficacy of the fair hearing as it exists today.

*S. The Binding Effect of Decisions on Local Agencies—The Publication and Distribution of Hearing Decisions.*

In any administrative agency, where authority is divided between state and local bodies, a decision by the state agency is of little consequence unless compliance with that decision by the local agencies can be assured. For the individual claimant, the sole concern is securing compliance with the decision of the state hearing authority by his own local welfare office. If, however, questions of general policy are resolved during the course of a hearing and subsequent decision, it is also significant that all other local agencies are apprised of the decision, and the necessity of their compliance with it. The *Handbook* attempts to secure state-wide enforcement of hearing decisions by providing that:

Decision by the hearing authority, rendered in the name of the State agency, will be binding on the state and local agency. *The*

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224. See Appendix *infra*.

225. E.g., OREGON SPWC STAFF MANUAL vol. II, ch. XI, § 2970.5 (1963), provides that the hearing shall be conducted within two months; NEVADA PUBLIC WELFARE MANUAL § 04-04-0000-0 (1967), provides for holding the hearing up to 60 days following the request.

226. Interview, *supra* note 127. One of the central problems in prosecuting welfare appeals is the lengthy delay before the hearing is held, and final decision is rendered. In Michigan, which has no provision for an overall time limit, the hearing is usually not held until at least 60 days after the request has been filed, and the final decision follows some time thereafter. Furthermore, the prior hearing regulation does not entirely solve this problem because it does not apply to the claimant merely receiving or applying for welfare. It applies only to restrictions, curtailments or terminations on existing grants.

In addition to the situation in Michigan, the excessive time problem has been such that class actions have been filed in a number of states challenging this failure to comply with the federal requirements. E.g., *Sprayberry v. Dulaney*, Civil No. 11662 (N.D. Ga., filed March 19, 1968); *Lage v. Downing*, Civil No. 7-2089-C-2 (S.D. Iowa, filed Oct. 30, 1967); *Royal v. Wyman*, Civil No. 3237 (S.D. N.Y., filed Aug. 6, 1968).

*State agency will establish and maintain a method of informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority, and the decisions will be accessible to the claimants, their representatives, and the public. . . .*<sup>227</sup>

This regulation attempts to achieve two central objectives. First, by providing that the decision will be binding on the local agency, it requires that the state agency be responsible for making sure that the decision is enforced. The regulations permit various methods for achieving this end, including a report by the local agency to the state department confirming the action taken to carry out the hearing decision, or a follow-up investigation by the state department officials.<sup>228</sup> Whatever method is used, the decision must be enforceable in the locality. Secondly, the regulation, by requiring the publication and distribution of hearing decisions, establishes sufficient state-wide notice to both claimants and the public, to guarantee that the decision will be of equal force and effect in all the localities within the jurisdiction. It provides the degree of policy continuity necessary for claimants to properly prosecute an appeal from any local office in the state.

The binding effect provision, if enacted by the states, will insure uniformity of decision and policy throughout the jurisdiction of the state agency. Without this uniformity, no state hearing process can be said to fully comply with the requirements of due process.

FIGURE 16—THE BINDING EFFECT AND THE PUBLICATION OF HEARING DECISIONS

		States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
The Binding Effect of Decisions	No. of States	27	0	19	0	4
	%	54%	0	38%	0	8%
The Publication of Hearing Decisions	No. of States	12	2	31	1	4
	%	24%	4%	62%	2%	8%

227. HANDBOOK pt. IV, 6200(c) (emphasis added). The latter part of this provision dealing with the publication and distribution of hearing decisions is relatively new, having been first transmitted to the states on Feb. 8, 1968.

228. *Id.* 6400(g). Although various follow-up procedures are permissible under the federal rules, the regulations clearly provide that "[r]emanding the case to the local unit for further consideration is not a substitute for definitive and final administrative action."

An examination of the state provisions governing the force and effect of hearing decisions reveals a significant failure to comply with either objective of the federal regulations. (See Fig. 16 *supra*.) Thirty-eight percent of the states lack provisions governing the effect of decisions on local agencies,<sup>229</sup> while sixty-two percent have no provision which would permit the publication and general distribution of the hearing decisions.<sup>230</sup> Although only a small number of states have insufficient or violative provisions,<sup>231</sup> full compliance with the federal mandate is restricted to a bare majority in the case of the essential binding effect clause,<sup>232</sup> while less than one-fourth have enacted regulations providing for the publication of the hearing decisions.<sup>233</sup>

The significance of the failure of a substantial number of states to enact regulations which would establish the required federal procedures is reflected in the experiences of many claimants with uniform decision-making within the different states. In some jurisdictions, because of a lack of adequate controls between the state and local offices, policy changes due to hearing decisions often do not filter down to the local agencies, and there is no established system for effecting their implementation.<sup>234</sup> In other jurisdictions, the failure of the state agency to properly publish hearing decisions has been the basis of mandamus actions challenging this lack of compliance with the federal rules.<sup>235</sup> The evidence indicates that failure to comply with the binding effect provisions is the cause, in a number of cases, of a substantial deprivation of the right to a fair hearing guaranteed by the Social Security Act.

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229. See Appendix *infra*.

230. *Id.*

231. Maine and Wyoming have insufficient publication clauses which fail to provide full accessibility of the decision to the claimant and the general public. *E.g.*, WYOMING PUBLIC WELFARE MANUAL vol. I, § 558 (1968).

232. See Appendix *infra*.

233. *Id.*

234. Interview, *supra* note 127. Mr. Stewart relates a personal experience in which one of his clients succeeded in having an established policy decision reversed in a hearing. The change was reflected in that particular county, but the policy was never changed in the other local offices throughout the state.

235. *E.g.*, Little v. Montgomery, No. 592396 (Sup. Ct. Cal., filed June 26, 1968); Robinson v. Board of Commissioners, Civil No. 3399-66 (D.D.C. July 12, 1967). (The court granted claimant's motion with respect to "any and all written decisions, from the date of commencement of the substitute policy through the present time, made by Hearing Officers . . . in appeals where an application was denied or assistance is continued.)

### *T. Opportunity to Examine the Official Record.*

Subsequent to the hearing it is often necessary for the claimant to refer to portions of the testimony and exhibits, especially if he contemplates taking his case into the courts for review. A significant aspect of the hearing process is the open accessibility of the official record. The federal regulations protect this right by providing that:

The record of the proceedings at the hearing, which constitutes the official record, is to be made available to the claimant or his representative to examine if he desires. If any additional material is made a part of the hearing record, this, too, would be made available.<sup>236</sup>

This provision requires the states to retain a complete copy of the official record, to acquaint the claimant with his rights to examine it, and to make it readily and freely accessible should he request to do so. Compliance with the requirement is not difficult, and requires only the enactment of the appropriate regulation authorizing complete access to the official record by the recipient or his representative.

FIGURE 17—OPPORTUNITY TO EXAMINE THE OFFICIAL RECORD

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	42	0	4	0	4
Percentage	84%	0	8%	0	8%

Although the opportunity to examine the official record is not as essential to the preservation of the fair hearing process as are other provisions, it is significant that an overwhelming majority of the states have complied with the federal requirement.<sup>237</sup> Only four states fail to provide for a full opportunity for the claimant to have full access to the official record.<sup>238</sup> Recognizing the limitations of a broad conclusion, the fact that such a large proportion of states have achieved full compliance indicates that when the state agencies desire to do so, they have

236. HANDBOOK pt. IV, 6400(h).

237. For a list of states which have provision for examination of the official record, see Appendix *infra*.

238. Arizona, Florida, Hawaii and Maine have no provision for examination of the official record. See Appendix *infra*.

little difficulty in enacting the provisions required by federal law. As a consequence, non-compliance with the other regulations cannot be attributed in any major respect to the inability of the state agency to enact the appropriate regulations. It would seem, from the point of view of the state agencies, that the crucial fact is not the question of enactment, but the amount of disruption caused by compliance, and the perceived ability to successfully continue with non-compliance.

#### *U. Notice of the Right to Judicial Review.*

One of the basic elements of the administrative fair hearing is that the decision will be subject to judicial review. Ordinarily, such right of review is to a court of record whose function is limited to a determination of whether the decision of the hearing authority was reasonable in light of the facts as found by the hearing officer; whether the decision was within the statutory authority of the agency; whether it was based on substantial evidence; and whether it embodies a correct interpretation of case law or statute. Because the availability of judicial review of state administrative decisions is dependent solely on the relevant state law, the federal hearing regulation cannot specify state judicial review as a mandatory requirement of the hearing process. However, judicial review of welfare hearing decisions is available in most of the states administering public assistance. Although only a few states expressly provide for state judicial review of welfare hearing decisions,<sup>239</sup> state court review is generally available either by virtue of state administrative procedure legislation or through judicial principles controlling review of administrative action.

The purpose of the federal regulations, therefore, is not to require that state judicial review be made available, but to insure that any review which may be available subsequent to a welfare hearing be clearly brought to the attention of the claimant at the time the final decision is announced. Thus, the *Handbook* provides that at the time the claimant is notified in writing of the decision of the hearing authority he must also be notified "to the extent it is available to him, of his right to judicial review."<sup>240</sup>

The federal regulations recognize that in some states the right of review may be specifically prescribed by statute, while in others the claimant may be able to invoke judicial review on the showing that the agency action was "unreasonable, arbitrary, or capricious." The

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239. *E.g.*, CAL. WELFARE AND INST'NS CODE § 10962 (West Cum. Supp. 1968).

240. HANDBOOK pt. IV, 6200(j).

content of the right to review will depend upon the nature and extent of the remedy available in the given state.<sup>241</sup> Regardless of this fact, the regulations are clear in compelling the states to provide clear, adequate, and timely notice to the claimant of the exact nature and extent of his right to a further review of his case in the state court.

FIGURE 18—NOTICE OF THE RIGHT TO JUDICIAL REVIEW

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined	No Review Available
Number of States	21	1	22	1	3	2
Percentage	42%	2%	44%	2%	6%	4%

An analysis of the state regulations indicates that only a small number of states specifically provide that no judicial review of welfare hearing is available.<sup>242</sup> Consequently, compliance with the federal regulation is possible in most of the jurisdictions. Despite this, less than one-half of the state agencies have provisions requiring that the notice of the decision also contain a detailed explanation of the claimant's right to state judicial review.<sup>243</sup> Most of the remaining states have no provision at all relating to notice of this right, while several have insufficiently detailed statements,<sup>244</sup> or regulations, which are more restrictive than the federal requirement.<sup>245</sup> (See Fig. 18 *supra*.)

In order to comply, the states must not only indicate that judicial review is available, but they must also specifically require that the claimant be promptly notified of this fact. The Connecticut regulations, for example, provide that it is the stated responsibility of the hearing officer to explain to the appellant "his right to appeal to

241. *Id.* 6400(i).

242. *E.g.*, OHIO PUBLIC ASSISTANCE MANUAL ch. 1200, § 1230 (1968): "The decision is binding on the appellant, the state and local agencies and is not subject to judicial review." WEST VIRGINIA FAMILY SERVICE MANUAL ch. 700, § 760 (1969): "There are no . . . provisions under the West Virginia Code for judicial review in matters regarding the receipt of public assistance."

243. See Appendix *infra*.

244. *E.g.*, VIRGINIA PUBLIC ASSISTANCE MANUAL vol. II, § 220.1 (1968). The Virginia manual provides that "the actions of any administrative boards are subject to judicial review," but there is no provision for notice of this fact to be given to the appellant.

245. *E.g.*, MINNESOTA PUBLIC WELFARE MANUAL VIII, § 6435 (1964).



the [state] Circuit Court if he is not satisfied,"<sup>246</sup> while the New York rules make clear that in the letter transmitting the decision of the hearing authority to the claimant, "clear reference shall be made [as to the] availability of judicial review."<sup>247</sup>

If the federal notice requirements are not enacted by the state agencies, it is reasonable to assume that few, if any, welfare hearing authorities take it upon themselves to notify the claimant of his right to judicial review. Since a majority of the states have no provision requiring notice of review, claimants in those jurisdictions are unaware of the right they have to take the hearing decision to a higher authority. Even in those states with explicit notice requirements, some claimants have questioned the established procedure which allegedly interferes with the full opportunity to obtain review.<sup>248</sup> This evidence supports the conclusion that the remedy of judicial review, though available in almost all of the states, is not an effective safeguard in many jurisdictions because of the lack of adequate notice to the aggrieved claimant.

#### *V. The Necessity for an Attorney and the Representation Requirement.*

One of the widely disputed questions concerning the welfare hearing process, concerns the role of the attorney in the hearing procedure. Most welfare administrators maintain that because state welfare agencies are designed to aid the recipients, the presence of an attorney tends to transform the hearing, originally designed as a review of an agency's decision, into a full adversary proceeding in which the state agency is placed in opposition to the claimant who ultimately suffers as a result.<sup>249</sup> The attorney is viewed by many as a "non-professional" who, untrained in the essentials of social work, tends to disrupt rather than assist the fair hearing process.<sup>250</sup> On the other hand, many com-

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246. CONNECTICUT PUBLIC ASSISTANCE MANUAL vol. I, P-6080(14) (1968).

247. NEW YORK PUBLIC ASSISTANCE MANUAL III, I(2), Rule 84.16 (1968).

248. In *Frederick v. Schwartz*, Civil No. 12759 (D. Conn., filed Sept. 18, 1968), the claimant contended that the Connecticut statutes which require payment of a \$7 fee prior to filing an appeal from a welfare hearing decision deprived him of due process and equal protection because of his financial inability to pay.

249. See, e.g., H. LEYENDERHER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE 269-90 (1955); Handler, *supra* note 45; Sparer, *The Role of the Welfare Clients Lawyer*, 12 U.C.L.A. L. REV. 361, 362 (1966); Interview, *supra* note 127.

250. Interview, *supra* note 127. There is a definite feeling that the hearing process is properly viewed only by professionals in social work administration as a proceeding in which all parties are seeking to help the claimant. Attorneys, by making demands, disrupt this process and antagonize workers and administrators.

mentators take the position that, in the absence of counsel, it is difficult, if not impossible, for the welfare claimant to secure the full benefit of the rights to which he is entitled.<sup>251</sup> Because of recent federal regulations, the dispute has become largely academic. However, the fact that serious doubts are entertained about the efficacy of legal representation by welfare workers and administrators, indicates potential conflict with the federal policy requiring the states to bring legal counsel into the structure of the hearing procedure.

Until recently, the federal regulations left the question of the presence of counsel to be settled by the state agencies, requiring only that the states afford the claimant sufficient notice of his right to counsel should he desire it. However, in spite of the contrary view of many state agencies, H.E.W. adopted the position that the presence of an attorney is, in many instances, a necessary adjunct to the fair hearing process. The federal rules now provide that:

In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payment for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the skill and knowledge of the legal profession in these matters.<sup>252</sup>

Because of the generally negative view of the state agencies toward the presence of attorneys in the welfare hearing, it is not surprising that this permissive regulation has had a negligible effect on state policy. The fact that federal financial participation (amounting to 75% of the total cost) is available to provide legal fees for appellants who desire counsel but cannot afford it, has not prompted a single state to enact the necessary provisions making such fees available.

With regard to the second clause of the regulation which recommends, as an alternative, a policy of referring appellants to community legal services, the response of the states has been similarly disappointing. Only five states have enacted regulations requiring the local agencies to refer claimants to available legal services.<sup>253</sup> Since such services

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251. Harvath, *supra* note 6; Reich, *supra* note 35; Note, *supra* note 172, at 485-89.

252. HANDBOOK pt. IV, 6400(a).

253. Delaware, New York, North Carolina, Ohio and Wyoming make some provision for referral to legal services. E.g., NEW YORK PUBLIC ASSISTANCE MANUAL IV(B)(4),

are available in most jurisdictions it is clear that the states are not proceeding to voluntarily integrate the attorney into the hearing process. In fact, thirty-seven states have no provision with respect to legal services to aggrieved individuals,<sup>254</sup> while several states have provisions which specifically discourage the local offices from making the services of counsel available to the claimant.<sup>255</sup>

Due to the apparent failure of the existing regulations to provide meaningful legal services to the welfare recipient, H.E.W. proposed, in November, 1968, the establishment of a full-scale legal services program by the states.<sup>256</sup> The new regulation embraces two separate proposals. First, the states are strongly urged to establish a legal services program with federal funds available for this purpose.<sup>257</sup> The proposal contemplates the establishment of a comprehensive range of legal services for public welfare clients with problems in the fields of domestic relations, consumer law, landlord and tenant relationships, etc.<sup>258</sup> The legal services program, although strongly recommended by the federal agency, is not binding on the states. The option is left to them whether or not to provide legal services, or the extent to which these services will be made available.<sup>259</sup>

The second part of the new provision has a much greater impact on the hearing process. Effective July 1, 1969, the new federal regulations provide that the states *must make available* the services of legal counsel to welfare clients who desire them in public welfare hearings under the fair hearing requirements of the Social Security Act.<sup>260</sup> The impact of the representation requirement cannot be overemphasized. If the states comply with this mandatory provision, the presence of an attorney in the welfare hearing will be an accomplished fact. The federal regulations do not specify the manner in which the states must

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Rule 358.6 (1968): "The social services official . . . upon the request of the appellant for legal counsel to assist him in the fair hearing, shall refer the appellant to community legal services available for such purpose."

254. See Appendix *infra*.

255. E.g., MINNESOTA PUBLIC WELFARE MANUAL, VIII, § 6422 (1964); OKLAHOMA DEPARTMENT OF PUBLIC WELFARE MANUAL § 546.71 (1968).

256. State Letter No. 1053, Principles for a Program of Legal Services for Public Welfare Clients (Nov. 8, 1968).

257. *Id.* "We strongly urge [the states] to move ahead as quickly as possible to establish legal services programs. Justice delayed is justice denied."

258. *Id.*

259. *Id.* Federal financial participation in the cost of legal services is available at the rate of 75 percent.

260. *Id.*; 33 Fed. Reg. 17853 (1968).

go about making such representation available to all hearing claimants. However, whatever the method employed, they are forbidden from supplying such representation from attorneys on the staff of the agency or under full or part-time retainer by it. The independence of the attorney to represent his client's interest must be assured.<sup>261</sup>

The mandatory representation requirement conclusively settles the dispute over the propriety of legal representation during the hearing. The stated policy of the federal agency with which the states must comply is that the presence of an attorney during all stages of the welfare hearing is a necessary and proper aspect of the fair hearing requirement. It remains to be seen to what extent the states will comply with the provision, in view of the obvious reluctance to provide such services voluntarily in the past. The analysis of the other hearing requirements, which are similarly mandatory on the states, has indicated that many states do not enact complying regulations even when the federal agency requires them to do so.

The regulation does not require an attorney everytime an adverse decision is reached, but only if a fair hearing is requested by the recipient. Consequently, even if the states do comply with the new provision by enacting the appropriate enabling regulations, the problem remains of notifying a client of his rights, and inducing him to appeal. The question of the administration of the hearing process, particularly the role of the caseworker, becomes even more significant. The caseworker is the means by which the claimant is informed of his rights under the fair hearing requirements. If the worker fails to properly administer the regulations, assuming the state has enacted them, the new regulations will be of little effect. A study of this aspect of the hearing process is, therefore, an even greater necessity if the representation provision is to be meaningful to the welfare recipient.

#### *W. The Due Process Requirement.*

The preceding sub-sections have analyzed the specific federal requirements governing the fair hearing procedure. These regulations

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261. The federal provisions specify that:

It is expected that the services will be provided through purchase arrangements by the public welfare agency. The priority method is the purpose of legal services from an existing community legal assistance service. . . . In the absence of an existing community service, the welfare agency may wish to explore with local bar or other groups the possibility of creating such a program.

establish a complete and detailed series of procedures which serve to guarantee aggrieved individuals the fair hearing established by the Social Security Act. The federal regulations, however, are not confined to a mere enumeration of specific requirements. They also provide that "[t]here is 'due process' in program administration affecting the right to public assistance."<sup>262</sup> This provision serves to emphasize that in addition to the specific federal requirements, the states are also bound to observe the requirements of due process in the administration of the hearing procedure.

What due process requires in an administrative fair hearing is far from clear. Due process is not a concept capable of exact definition. It has been stated by one court that "due process embodies the differing rules of fair play, which throughout the years, have become associated with different types of proceedings."<sup>263</sup> If this is the case, then the well-accepted standards governing the administrative hearing which were examined earlier,<sup>264</sup> must at least be the basis of due process in the welfare hearing procedure.

From the viewpoint of the state regulations, two relevant considerations are involved: it is essential for the states to recognize that their hearing procedures are subject to the requirements of due process; moreover, the administration of the hearing process must implement this policy by providing those procedures essential to such requirement.

FIGURE 19—DUE PROCESS REQUIREMENT

	States Which Comply	Insufficient Provision	No Provision at All	Violates or Restricts	Undetermined
Number of States	7	0	39	0	4
Percentage	14%	0	78%	0	8%

Of the participating states, only seven have enacted provisions which recognize that the hearing process is subject to the requirements of due process. The remainder are silent, having no provision incorporating this important principle.<sup>265</sup> It can be argued, of course, that express recognition of the due process principle by the states is not essential to the

262. HANDBOOK pt. IV, 6400(b).

263. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

264. See Section II *supra*.

265. For a list of complying and non-complying states, see Appendix *infra*.

enactment of the necessary hearing procedures. However, the analysis of the federal requirements and the extent of state compliance lends credence to the assertion that in many of the states the established hearing procedures do not comply with the federal requirements. It is clear that not only do many states fail to state that their hearing procedures are subject to due process, but a large number have failed to enact the necessary regulations which would insure that the hearing process comports with the federal standards which are deemed to comprise administrative due process.

#### X. *Summary.*

The purpose of the preceding examination of the federal hearing regulations has been to determine the exact nature of the mandatory requirements, and the degree to which the states have complied with these requirements. Previous legal analysis has focused primarily on making such constitutional guarantees as due process and equal protection applicable to the fair hearing process—hence the extended argument over the “right” to welfare payments. Such considerations are, no doubt, valuable in other areas of public assistance, but for the purposes of the welfare hearing, they are merely speculative and unnecessary. Rather, as this analysis has demonstrated, the federal hearing regulations, with the addition of the new representation and prior hearing provisions, go as far as any previous concepts of “due process” or “equal protection” in guaranteeing each claimant a fair hearing. Although certain aspects of the federal regulations require revision, the framework that is established provides all the procedures necessary for full and complete control of unreasonable, discriminatory or restrictive agency decision making.

In practice, however, the hearing process as it exists in the various states does not adequately serve its required purpose. A comparison of the state regulations with the federal requirements indicates that the problem lies not in the content of the federal requirements, but in the fact that the states, on the whole, fail substantially to comply with these requirements. The most significant object of inquiry in this area is to establish the reason existing procedures are ignored by the states. To accomplish this objective, it is first necessary to examine the state regulations in their entirety, i.e., to assess the provisions they actually contain. Though this has been accomplished in some measure in the preceding discussion, the concluding section will attempt to more fully

describe the various procedures the states provide, and to isolate those areas where their omissions are most significant.

#### IV. THE STATE HEARING REGULATIONS: AN ASSESSMENT

##### *A. State Regulations—The Common Denominator.*

Although it is now possible to make some substantial judgments about what the state regulations do not provide, it is also significant to obtain some kind of a generalized view of what they do provide. What elements of the hearing process are common to all, or nearly all, of the state provisions? The state regulations are all based on the premise that the state agency must establish some form of appellate procedure whereby claimants can appeal agency decisions on the local level and obtain an authoritative review at the state level.<sup>266</sup> All states have accepted this responsibility, and have enacted regulations which establish a framework for the initiation and prosecution of a welfare appeal. To this extent, at least, a state level hearing is available in some form in all jurisdictions. The nature of that hearing, and the provisions enacted to govern administrative actions, vary substantially from state to state, but, regardless of the inequities and inequalities of the existing procedure, the basic framework exists in all jurisdictions for the establishment of an effective hearing process.<sup>267</sup>

Having taken the initial step of creating an appellate process within the agency, the states have all promulgated regulations which establish a minimum procedure designed to implement that goal. Reducing the state procedure to a universal level produces a common denominator of protection and recognition of the rights of welfare recipients. Common to all the states are provisions which recognize the right of the individual claimant to the "traditional" grounds of appeal, specifically, the right to appeal agency decisions regarding eligibility, amount of assistance, the manner and form of payments, conditions of payments and the failure of the agency to act with reasonable expediency on a claim for assistance.<sup>268</sup> Although these provisions serve to permit

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266. See HANDBOOK pt. IV, 6200(a).

267. This is perhaps a more significant statement than it seems. Because the Social Security Act allows the states the option of having either a state administered system, or a locally administered system with state supervision, a number of states have chosen to permit their categorical assistance programs to be locally administered. Consequently, the establishment of a state level hearing process, in these states is a significant first step in creating a fair hearing procedure. See HEW REPORT, *supra* note 68.

268. HANDBOOK pt. IV, 6300(c) (1), (3).

a limited accessibility to the fair hearing by recognizing the right of all recipients to appeal certain agency decisions, they do not assist claimants desirous of challenging agency policy and interpretation of the law. Unfortunately, the policy appeal, perhaps the single most significant grounds for appeal, has received minimal recognition by the states.<sup>269</sup> Thus, the average claimant must remain content with procedures which provide recourse solely from error in decision-making at the local level.

In addition to a general recognition of a limited right to appeal, all states have some elemental form of notice requirement.<sup>270</sup> Although full notice to the claimant of his right to a hearing and to representation is not universally provided, the regulations do specify that some form of notice must be given. However, the only universally recognized notice is that provided on the application forms, and in the brochures distributed to prospective recipients during the intake process. Although this limited form of notice does exist in all localities, and serves, in some measure, to fulfill the purpose of informing the claimant of his right to a hearing, it is doubtful that the applicants receiving this kind of notice have a full understanding that this right exists.<sup>271</sup>

The state regulations recognize that there must be some established procedure whereby claimants can request, through the local office, a state level review of the decision. Request provisions are common to almost all the states,<sup>272</sup> but in many a mere expression of a desire to appeal is insufficient to initiate a hearing. Rather than providing full access to the hearing, the state provisions often require that formal written demands be submitted before a request will be transmitted to the state agency. The only common ground among the states with respect to request provisions is that all have a procedure which the

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269. A central criticism of existing state hearing procedure is the failure of the state to provide for a review of agency policy and interpretation through the hearing process. There seems to be an administrative tendency to use existing policy to justify the action rather than to use the situation to question policy. Wedemeyer & Moore, *The American Welfare System, THE LAW OF THE POOR*, 1, 18 (1966).

270. Eighty-six percent of the states have some kind of notice requirement. See Figure 2 *supra*.

271. See Briar, *Welfare from Below: The Recipient's View of the Public Welfare System, THE LAW OF THE POOR* 46, 54-55 (1966). Briar's study indicated that 60 percent of the recipients felt they had not been informed about the right to appeal. It is Briar's contention that they probably were given some form of notice but that it didn't register on them. *Id.* at 55.

272. Ninety percent of the states have some kind of request procedure. See Figure 3 *supra*.



local agency must follow in processing demands. Although there is some advantage to formal procedure that insures uniformity and discourages official irresponsibility, the restrictive nature of these provisions limit the freedom of the appellant to demand a hearing.<sup>273</sup>

Another element common to most of the states is the recognition that the claimant must be allowed a reasonable time to appeal the agency decision.<sup>274</sup> Although not all the states have established time limits within which the claimant may file a request, only one state has enacted limits which are clearly unreasonable. Perhaps more significant is the general provision of some form of informal complaint procedure whereby adjustments can be made short of a formal appeal.<sup>275</sup> However, this procedure, at its lowest common denominator, does not include state level participation in complaints nor an opportunity for claimants to respond to adverse action in advance. The complaint procedures common to all the states consist merely of a process whereby a recipient's dissatisfaction can be referred from the welfare caseworker to an administrator. It does not include a procedure for review of the decision in question at either the state or local level. In this form the complaint procedure appears merely as an attempt to pacify the claimant in order to avoid a formal appeal.<sup>276</sup> Without an established policy of decisional review with recipient participation, the existing procedure cannot be said to add to the effectiveness of the hearing process.<sup>277</sup>

A significant common ground of state regulation is the provision for the convenience of the claimant in setting the time, place, and date of the hearing.<sup>278</sup> This is not to say that all states provide for the convenience of the claimant to the degree required by the federal regulations. However, most states give it some recognition in scheduling the hearing. Unfortunately, for many welfare recipients, this is simply not sufficient to

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273. Interview, *supra* note 127. Mr. Stewart states that a number of welfare claimants have reported to him that, although they orally requested an appeal, when they were given a written form to complete they failed, for a variety of reasons, to undertake the effort necessary to submit the form, and thus an appeal was never instituted.

274. Sixty-four percent of the states have established periods of time for an appeal ranging from 30 days to 3 months. Although a number of states are silent with respect to the time limit for an appeal, only two states have limits which are clearly unreasonable. See Sub-section F *supra*.

275. Seventy-six percent of the states have some form of established complaint procedure. See Figure 4 *supra*.

276. Caseworker Interview.

277. Wedemeyer & Moore, *supra* note 269.

278. Eighty-six percent of the states have some provision that the convenience and needs of the claimant are to be given at least some consideration. See Figure 8 *supra*.

overcome their financial and physical handicaps. Their needs often require primary and mandatory consideration if they are to be able to attend and fully present their case without substantial sacrifice.<sup>279</sup> This kind of consideration is not common to the states, and that which is provided is not sufficient to fulfill the goal of an open and fair hearing to those who desire it.

Common to all the states is a uniform procedure by which a hearing request is to be considered withdrawn or abandoned.<sup>280</sup> In general, the procedures provide that no withdrawal can be considered unless it is made by the claimant himself or his representative. Although this does serve to protect appellants, to some degree, from arbitrary administrative action in terminating appeals without their permission, the fact that not all states require withdrawals to be in writing means that applicants are not provided adequate protection against pressures to abandon an appeal.<sup>281</sup> It is commonly established that no appeal can be considered abandoned unless the appellant fails to appear at the designated time and place for the hearing. However, all regulations do not provide a procedure whereby the agency is required to make a further effort to determine the reason for the claimant's failure to appear. Therefore, although established abandonment procedures provide some protection against official malfeasance, they fail to make sufficient allowance for his inability to present his case at the designated time and place.

The preceding provisions have involved procedures which govern the conduct of the hearing process prior to the hearing. Procedures relevant to the hearing itself are also found in all state regulations. Not all of the states have rules of procedure which serve as adequate guidelines during the hearing, but there is universal recognition of certain basic rights to be made available to appellants.<sup>282</sup> Those rights which are common to nearly all the states are: the examination of documents and records to be introduced at the hearing; the presentation of the case by legal counsel; the introduction of witnesses; the opportunity for the claimant to establish his own case, and to question or re-

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279. Welfare Administrator Interview.

280. Although 90 percent of the states have some established regulation governing withdrawal and abandonment of hearing requests, many have regulations which fail to adequately protect the claimant from administrative pressure. See Figure 10 *supra* and accompanying text.

281. *Id.*

282. Ninety-six percent of the states have established regulations which guarantee the claimant some basic measure of rights at the hearing. See Figure 11 *supra*.

fute other testimony.<sup>283</sup> The common rights granted by all states do not go as far as the federal regulations require. Some states restrict the claimant's right to cross-examine agency witnesses, to advance arguments without interference, and to examine all documents and records.<sup>284</sup> The regulations in general fail to establish uniform and detailed hearing procedures, and to recognize that the hearing is subject to the requirement of due process.<sup>285</sup> At best, they provide a minimum of procedural safeguards necessary to full review of the decision. Without the more detailed and explicit procedures necessary for the claimant to fully prepare and present his case,<sup>286</sup> the hearing is subject to confusing testimony, conflicting findings, and an inadequate record for decision.<sup>287</sup>

State procedures generally establish some definite time limit between request for a hearing and final administrative action.<sup>288</sup> The time limits that have been established, however, do not, in many cases, approximate the federally accepted standard.<sup>289</sup> As a consequence, although some limits do exist in most states, and are a factor in preventing arbitrary agency action, the fact that, generally, they are unreasonably long, means that full protection is denied the recipient.

The final provision common to the state regulation is the opportunity granted to the appellant to examine the official record subsequent to the hearing.<sup>290</sup> This opportunity is available only upon specific request, and generally must be made at the state or local office. Although this is a safeguard against arbitrary action subsequent to the hearing, it is significant primarily because it enables the claimant to prepare any further appeal that he may desire to take in the courts.

These provisions constitute all the regulations which are common to the state hearing regulations. In most instances they fail to provide sufficient protection to the welfare appellant. Further, many procedures

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283. With few exceptions these comply with the federal requirements in *HANDBOOK* pt. IV, 6200(i) (1)-(6).

284. See Figure 11 *supra* and accompanying text.

285. *Id.*

286. Interview, *supra* note 127. Mr. Stewart attributes the inability of appellants or their attorneys to adequately argue their case to the lack of uniform rules of procedure, which causes confusion and inconsistent judgments.

287. *Id.*

288. Eighty percent of the states have some provision which provides a time period within which the agency must act. It should be noted that a number of these specifically violate the federal 60 day standard. See Figure 15 *supra* and accompanying text.

289. *Id.* notes 223, 225 *supra*.

290. Ninety-two percent of the states provide for this right to some degree. See Figure 17 *supra*.

are omitted from this common base entirely. The common denominator of state regulations does not include any procedure for the: publication and distribution of hearing procedure; prior examination of documents; prohibition of non-record information; establishment of an independent medical assessment where necessary; guarantee of an impartial hearing officer and hearing authority; establishment of an exclusive record for decision; provision for retroactive payments, or payments pending the outcome of the hearing; enforcement of hearing decisions in all localities; publication of hearing decisions; right to judicial review of the final administrative decision; and recognition of the need for due process, and the services of counsel during the hearing.

This list of omissions serves to substantiate the previously postulated thesis that the state regulations, taken as an entity, do not, at their lowest common denominator, provide more than a few elemental procedures governing the hearing process. Without the remaining procedure, deemed, by the federal agency at least, to be necessary to the hearing process, there can be little doubt that the states provide insufficient protection to the claimant against arbitrary, unreasonable or unlawful administrative action, as well as an insufficient opportunity for full access to the hearing process, and full review of agency decisions. At this common level, the judgment must be made that the state regulations deny claimants the effective fair hearing which they are granted by federal law as a matter of right.

If, taken as a whole, the states have failed to enact the necessary regulations to provide even a minimal amount of protection and recognition necessary for a fair hearing, the question remains whether, individually, some states approach this standard.

### *B. The State Regulations: An Individual Profile.*

After examining what the states as a whole provide, it may no longer be surprising that no state participating in public assistance complies in full with the federal requirements. There are a total of twenty-seven federal requirements. It might be argued that some of these, though admittedly mandatory on the states, are not absolutely essential to an effective fair hearing. To meet this argument the following analysis will focus on the states individually, not only in relation to the full range of federal requirements, but also with respect to certain "essential" provisions.

FIGURE 20—PROFILE OF STATE HEARING REGULATIONS

A						B					
STATE PERFORMANCE BASED ON ALL TWENTY-SEVEN FEDERAL REQUIREMENTS						STATE PERFORMANCE BASED ON TWELVE "ESSENTIAL" REQUIREMENTS					
STATE	Number of Complying Provisions	Percentage Compliance	Insufficient Provisions	Restrictive Provisions	No Provision at All	STATE	Number of Complying Provisions	Percentage Compliance	Insufficient Provisions	Restrictive Provisions	No Provision at All
N. M.	21	77%	2	0	4	Wyo.	9	75%	1	0	2
Wyo.	20	74%	4	0	3	Conn.	9	75%	0	1	2
Maine	20	74%	1	0	6	Ohio	9	75%	1	0	2
Conn.	20	74%	1	1	5	N. Car.	8	67%	1	1	2
Wash.	19	70%	0	0	8	N. Mex.	8	67%	0	0	4
Ohio	19	70%	2	2	4	Wash.	8	67%	0	0	4
Colo.	18	66%	1	0	8	Alaska	8	67%	2	0	2
N. C.	18	66%	5	1	3	Ark.	7	59%	3	1	1
Alaska	18	66%	3	LITERAL REINACT.	6	Colo.	7	59%	1	0	4
Del.	17	63%	2	0	8	Del.	7	59%	2	0	3
Hawaii	17	63%	2	0	8	Hawaii	7	59%	1	0	4
Texas	17	63%	1	0	9	Maine	7	59%	0	0	5
Mo.	17	63%	0	0	10	N. Y.	7	59%	0	0	4
R. I.	16	59%	3	0	8	Miss.	7	59%	0	1	5
Montana	16	59%	1	0	10	Mon.	7	59%	0	0	5
N. Y.	16	59%	1	2	8	Texas	7	59%	1	0	4
Ark.	16	59%	5	1	5	Utah	7	59%	0	0	5
La.	16	59%	2	2	7	Okla.	6	50%	0	0	6
Miss.	15	55%	3	0	7	Va.	6	50%	2	1	3
W. Va.	15	55%	2	0	10	W. Va.	6	50%	1	0	5
Ky.	15	55%	2	0	10	R. I.	6	50%	2	0	4
Utah	15	55%	1	0	11	Cal.	6	50%	2	0	4

FIGURE 20—PROFILE OF STATE HEARING REGULATIONS—CONTINUED

A						B					
STATE	Number of Complying Provisions	Percentage Compliance	Insufficient Provisions	Restrictive Provisions	No Provision at All	STATE	Number of Complying Provisions	Percentage Compliance	Insufficient Provisions	Restrictive Provisions	No Provision at All
Okla.	15	55%	0	1	11	Md.	5	42%	1	1	5
Tenn.	15	55%	1	2	13	Mo.	5	42%	0	0	7
Ga.	14	52%	0	0	9	Oregon	5	42%	1	0	6
N. J.	14	52%	1	1	11	Penn.	5	42%	0	1	6
Va.	13	48%	5	2	7	Tenn.	5	42%	0	0	7
Md.	12	44%	3	1	11	La.	5	42%	1	1	5
Oregon	12	44%	3	2	10	Ga.	4	33%	0	0	8
S. Dak.	12	44%	3	3	9	Mich.	4	33%	0	1	7
Mass.	11	41%	2	0	14	N. J.	4	33%	0	0	8
Cal.	11	41%	2	1	13	N. Dak.	4	33%	1	1	6
Minn.	11	41%	0	3	13	S. Dak.	4	33%	2	1	5
S. Car.	10	37%	6	0	17	Ky.	3	25%	2	0	7
Mich.	10	37%	1	2	14	Mass.	3	25%	0	0	9
Ala.	10	37%	3	3	11	Minn.	3	25%	0	2	7
Idaho	9	33%	3	0	15	S. Car.	3	25%	0	0	9
Kansas	9	33%	2	0	16	Arizona	2	17%	1	1	8
N. Dak.	9	33%	3	2	13	Idaho	2	17%	2	0	8
Nevada	9	33%	1	2	15	Indiana	2	17%	1	0	9
Penn.	9	33%	2	3	13	Iowa	2	17%	1	0	9
Indiana	7	26%	1	0	19	Kansas	2	17%	2	0	8
Iowa	7	26%	1	0	19	Neb.	2	17%	0	1	9
Fla.	7	26%	5	1	14	Nevada	2	17%	0	3	7
Neb.	7	26%	0	1	19	Fla.	1	8%	4	0	7
Arizona	7	26%	3	2	15	Illinois	1	8%	0	1	10
Illinois	5	19%	3	1	18	Ala.	3	25%	1	3	7

To determine whether any of the state regulations provide a sufficient procedural framework to insure the effective operation of the hearing process, it is necessary to first establish a standard by which each state's performance can be measured. The primary criteria for assessing the state regulations must be the federal requirements as promulgated in the *Handbook*. Even if these requirements were not mandatory on the states, they would still serve as the most clearly developed statement of those regulations that are necessary to provide welfare claimants a fair hearing. Any state whose provisions parallel the federal rules will have a sufficient basis from which an effective appellate process can be administered.

An analysis of individual state provisions, however, provides conclusive evidence that none of the states has reached, or even approached, conformance with the federal rules (*see* Fig. 20 *supra*). In varying degrees all fall short of meeting the necessary test of compliance with the full spectrum of federal requirements.<sup>291</sup> It seems obvious, however, that the probability of a claimant receiving a fair hearing is greater in those states whose regulations more nearly reflect the federal standards than in those where the federal guidelines have been largely ignored. In addition to measuring state performance on the basis of degree of compliance, it also is necessary to take into consideration whether they make some provision, albeit insufficient,<sup>292</sup> or whether, instead of mere omission, they have enacted provisions which specifically restrict or violate the federal requirements.<sup>293</sup> By taking all these factors into consideration it is possible to establish a continuum of performance by each state. This ranges in relatively uniform increments from the highest level of performance achieved by the New Mexico agency, compliance with 77% of the federal requirements, to the lowest point, marked by the Illinois agency at only 19% compliance (*See* Fig. 20 *supra*). However, the only valid judgment that can be based on this analysis is that the procedure in New Mexico comes substantially closer to insuring a fair hearing than does the established procedure in Illinois. In the absence of any indication of the provisions that are omitted or restricted in any given state, and their relative importance to the

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291. *See* Appendix *infra*.

292. It is impossible to establish an arithmetic rating of the states based on the number of insufficient provisions rather than complete omissions. Consequently, the procedure has been to indicate that such differences do exist which should be used in any consideration of the effectiveness of any state procedure. *See* Figure 20 *supra*.

293. The differentiation that is to be given to a state which has a restrictive provision opposed to one with no provision at all is a matter of individual judgment. The fact is merely noted to enable a complete judgment to be made. *See* Figure 20 *supra*.

hearing process, it is impossible to determine whether the regulations of any of the states provide an adequate minimum procedure.

In order to provide a basis for judgment about whether any state procedures provide an acceptable minimum of protection, though falling short of full compliance, it is necessary to identify those provisions which are essential to the establishment of a minimum level of effective protection of the fair hearing process. Using the standards for administrative hearings that prevail in other agencies,<sup>294</sup> and considering the special needs, and situation of the welfare appellant,<sup>295</sup> certain provisions can be identified which provide a minimum acceptable procedural protection.

A number of essential provisions are necessary to insure free access to the fair hearing. The first is one establishing the nature, and extent of the notice given to claimants of their right to a hearing. To be effective, the regulations must provide: 1) that the claimant is notified of his right to a hearing; 2) that he is notified of his right to representation during the hearing; and 3) that he is given a full explanation of these rights.<sup>296</sup> A further essential requirement is a provision permitting the claimant to challenge agency policy, and interpretation of the law. It is common administrative procedure to permit interested parties a hearing prior to substantive rule making.<sup>297</sup> Since the welfare process does not provide for such procedure, it is essential that the claimant be allowed to question policy or agency rules during the hearing process.<sup>298</sup> A provision establishing a simple and non-restrictive request procedure is required because of the special liabilities and handicaps common to many recipients.<sup>299</sup> It is here that regulations are most necessary for control of arbitrary agency behavior, and, in the absence of a provi-

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294. See Section II *supra* and accompanying notes.

295. The fact is that welfare claimants' realization of the availability of the hearing process, knowledge of its procedures, and willingness to prosecute an appeal, is of a much lower degree than is found in most individuals aggrieved by agency action. See Briar, *supra* note 271.

296. Federal and state agencies recognize that adequate notice is essential to the administrative hearing. See, e.g., Administrative Procedure Act § 5(a), 5 U.S.C. § 1005(a) (1964); REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 9(a)-(b). The notice requirements in the welfare hearing must, necessarily, be more stringent than the commonly accepted procedure because of the lesser degree of comprehension, and viability of the administrative process peculiar to the welfare claimant. See Briar, *supra* note 271.

297. Administrative Procedure Act § 3(2), 5 U.S.C. § 1003(2) (1964). "In case of substantive rules, opportunity for oral hearing must be granted. . . ."

298. Wedemeyer & Moore, *supra* note 269.

299. A reflection of the unwillingness of many recipients to initiate an appeal is the fact that any impediments placed in their way, no matter how insignificant, often serve to discourage exercise of the right. Interview, *supra* note 132.



sion that any form of request is acceptable, access to the hearing process is unacceptably limited.

There are a number of provisions essential to effective preparation and prosecution of a fair hearing. No hearing can be said to have an adequate procedural framework unless it provides for: opportunity for the claimant to respond to questions regarding his situation prior to termination; publication of hearing procedures; prior examination of documentary evidence; establishment of basic rights governing the hearing itself; effective participation of counsel in the hearing process; and continuation of payments pending the hearing (or at least provision for retroactive payment). These provisions, though in some instances common to all administrative hearings, are especially required due to the unique relationship of the welfare claimant to the agency. Because categorical assistance is initially predicated on need, the claimant is much more limited than other aggrieved individuals in his ability to seek and retain counsel, as well as to subsist pending the hearing. Consequently, it is necessary to make provision for advance opportunity to respond to questions, to provide for legal services, and for continuance of assistance payments.<sup>300</sup> The provisions requiring full disclosure and established hearing procedures are essential to enable a claimant to properly prepare and present his case. Without these safeguards it is unreasonable to expect a claimant to be able to effectively refute an agency decision.<sup>301</sup>

Finally, subsequent to the hearing, it is essential that there be some provision that the hearing decision will be enforced at the local level, and that compliance is required in all localities. In the absence of this requirement, the decision is merely a Pyrrhic victory for the claimant, who remains deprived of his rights by local action.<sup>302</sup>

These aforementioned provisions are all essential to the welfare hearing process. They establish a minimum of procedural safeguards. The remaining federal requirements and related standards are significant, but, arguably, are not essential to guarantee a fair hearing. They serve primarily to insure the fullest measure of procedural protection. Considering the essential provisions alone, it can be said that this standard constitutes the minimum that the state regulations must provide.

Based on this minimum standard it is possible to assess the performance of the various states. The results of this analysis are not significantly

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300. See sub-section Q and V *supra*.

301. See sub-section H, I and N *supra*.

302. Interview, *supra* note 127.

more encouraging than was the comparison based on the more rigorous full federal requirements. (See Fig. 20 B. *supra*). Despite the fact that the essential provisions are a minimum level of achievement, none of the states have enacted sufficient regulations to provide even this degree of protection. Placing the state regulations on a scale based on compliance with the essential requirements, performance ranges from a high of 75% by Wyoming<sup>303</sup> to 8% by Florida and Illinois.<sup>304</sup> From this analysis the conclusion is clear that none of the states provide sufficient procedures to insure even the minimal amount of protection necessary to the welfare claimant. Reducing the federal standards to their most basic essentials does not measurably increase the percentage of state compliance. It is evident that the omissions found in all the states, even those who come closest to the federal requirements, are not failures to enact secondary or supportive procedure, but represent a failure to enact the necessary essential procedures. Although some states obviously provide a much greater degree of administrative regulation than do others, the omissions that exist represent essential prerequisites to an effective fair hearing.

### C. Conclusions and Recommendations.

It has been established that the state hearing regulations are insufficient to provide an effective hearing process for welfare claimants.<sup>305</sup> The question remains as to why no state has complied with the necessary requirements. Three reasons are suggested: 1) the federal agency does not exercise sufficient control over the state agencies nor compel compliance with mandatory regulations; 2) the states do not have sufficiently well-established rule-making procedures to enact the necessary regulations on their own initiative; and 3) since the Act permits the states to choose between state administered, and locally administered, state supervised, public assistance programs, there is a lack of uniformity in state administrative procedure, which further impedes proper regulatory procedures.

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303. The Wyoming provisions fully comply with all the essential provisions except that there is insufficient notice of the right to an attorney, and a failure to enact any procedures providing advance opportunity to respond to agency decisions, and for the binding effect of hearing decisions. See generally WYOMING PUBLIC WELFARE MANUAL vol. I, §§ 550 *et seq.* (1968).

304. The only essential provision found in the Illinois procedure is the publication of adequate hearing procedure. ILLINOIS CATEGORICAL ASSISTANCE MANUAL § IV, art. I, Rule 1.01 to 1.26 (1963). The only provision enacted by Florida is an adequate request clause. FLORIDA MANUAL OF PUBLIC WELFARE ch. 100, §§ IV-V (1967).

305. See Appendix *infra*.

*Failure of Federal Control.* The inability of the federal government to compel state compliance is an obvious conclusion based on the fact that the mandatory federal requirements and state regulations do not parallel each other. If the federal agency were able to adequately secure compliance by the states, there would be no need to further investigate the nature of the state provisions, and the reasons for their failure to establish adequate procedure. All that would be required would be a determination of whether or not the federal requirements themselves were sufficient and adequate to provide a fair hearing. Such federal control does not exist at the present time. However, even if the federal regulations do not have practical mandatory effect, they should serve as a standard for state achievement. Yet the states, although they have followed this standard to some degree, have failed to enact comprehensive requirements which provide the same measure of protection deemed essential by the federal rules. To determine why the states have failed to use the federal regulations as a model for their hearing regulations, it is necessary to examine reasons for the states' failure to act which go beyond the mere absence of effective federal control.

*Insufficient Rule-Making Procedures.* The procedures used by administrative agencies to promulgate rules and regulations vary substantially with the nature of the regulations, and the agency, whether state or federal.<sup>306</sup> The federal A.P.A. and the administrative procedure legislation of some states specifically provide for the requirement of proper notice, and a hearing prior to the promulgation of proposed rules.<sup>307</sup> This hearing requirement does not, however, apply in all situations. For example, the Act does not require a hearing in the case of most procedural and interpretive regulations, or in situations where such procedures are "impracticable, unnecessary, or contrary to the public interest."<sup>308</sup> The absence of formal hearing requirements for some types of regulations, and under certain circumstances, does not mean, however, that administrative rules are promulgated without any extra-agency advice or participation. In the absence of a formal hearing, it is standard practice for agencies to depend upon informal consultation with informed or affected individuals, or with other advisory bodies, prior

306. K. DAVIS, *ADMINISTRATIVE LAW* 124 (1965).

307. Administrative Procedure Act § 4, 5 U.S.C. § 1004 (1964). "[A]fter notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views or arguments. . . ." The hearing requirement for rule making is required in Iowa, Massachusetts, Nebraska, Ohio, Virginia and Wisconsin. See K. DAVIS, *supra* note 306, at 125.

308. Administrative Procedure Act § 4(a), 5 U.S.C. § 1004(a) (1964).

to issuing new rules.<sup>309</sup> Although the standards of rule-making procedure which prevail in federal or state administrative agencies are not binding on the welfare agencies, it is instructive to compare these procedures with those employed by the welfare departments. With few exceptions, the state boards charged with formulating rules governing welfare administration in the states have established no formal procedure prior to promulgation of new or revised rules.<sup>310</sup> This lack of formal rule-making procedures is a central reason for the failure of the hearing regulations to provide sufficient safeguards to guarantee the effectiveness of the hearing process. In addition to providing a forum for a full review of those provisions that are required, rule-making procedure produces the kind of continuity and consistency absent in the state hearing regulations.

Several of the state welfare agencies have come to recognize the need for more formalized rule-making procedure, especially with regard to revised hearing regulations. The New York State Welfare Board, in a departure from past practice, recently instituted public hearings on proposed rules governing fair hearing procedure.<sup>311</sup> Pursuant to this procedure, welfare clients, attorneys, welfare caseworkers, and administrators, as well as other interested parties, were permitted to testify before the New York Board.<sup>312</sup> An even more ambitious effort to provide a more effective process for rule-making has been adopted by the Washington State Welfare Commission. The state agency has issued regulations which establish a formal and uniform procedure under which any interested person may petition the agency requesting the "promulgation, amendment or repeal of any rule."<sup>313</sup> Following any such petition, the department, at its discretion, may either: 1) issue a nonbinding declaratory ruling; 2) notify the interested party that no declaratory ruling is to be issued; or 3) order a hearing for further argument on the requested action.<sup>314</sup> In addition to the initiation of

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309. K. DAVIS, *supra* note 306.

310. Interview, *supra* note 127.

311. These hearings were held for the first time on July 21, 22, 1967. 8 WELFARE L. BULL. 10 (1967); 10 WELFARE L. BULL. 9 (1967).

312. *Id.*

313. WASHINGTON PUBLIC ASSISTANCE MANUAL II § 388-08-540(1) (1968).

When the petition requests a promulgation of a rule, the requested or proposed rule must be set out in full. The petition must also include all the reasons for the requested rule together with the briefs of any applicable law ....

*Id.* § 388-08-540(2).

314. *Id.* § 388-08-580(1).

rule-making by interested parties, the regulations also provide for the promulgation of rules on the agency's own motion. Department initiated rule-making is preceded in most cases by the opportunity for notification and hearing on the proposed changes.<sup>315</sup> By providing for this formal rule-making procedure, the Washington agency has established at least a basis from which comprehensive and effective hearing regulations can be enacted.<sup>316</sup>

The examples set by New York and Washington, in enacting formal rule-making procedures, should not be ignored by the other state agencies. The lack of such procedure is a prime reason for the failure of the states to provide effective hearing regulations. It is not essential that the rule-making procedures require formal notice and hearing provisions, although, given the nature of the welfare hearing, such provisions would be advisable. What is necessary, however, is that some kind of procedure be enacted by the state agencies to provide the essential hearing regulations presently lacking in state procedures.

*The Method of State Administration.* The final factor which accounts, in some measure, for the inconsistent, and inadequate state hearing regulations, is the variation in the method of state administration permissible under the Social Security Act. The Act provides that a state plan must "either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment . . . of a single state agency to supervise the administration of the plan."<sup>317</sup>

Given the option under the Act of providing either a state administered or a locally administered, state supervised plan of administration, twenty-three of the states have opted for the state supervised plan, while the remaining twenty-seven provide for direct state control.<sup>318</sup>

Although the hearing regulations of those states with state administered programs do not provide the level of procedural safeguard necessary for the effective administration of the hearing process, they do provide a substantially greater level of compliance with federal regulations than do the state supervised programs.<sup>319</sup> For example, of

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315. *Id.* § 388-08-080.

316. It is perhaps no coincidence that the Washington hearing procedures are among the most comprehensive and adequate of any of the states. See Figure 20 *supra*.

317. Social Security Act, 42 U.S.C. §§ 302(a)(3) (1964) (emphasis added).

318. HEW REPORT, *supra* note 68.

319. With regard to all twenty-seven federal requirements, the "state administered"

the fifteen state programs which most closely approximate the federal standards, twelve are state administered while only three are state supervised plans.<sup>320</sup> It seems clear that the state supervised programs provide less effective regulation than do those that are state-administered. That the state-supervised states are less receptive to federal regulations is due primarily to the fact that, by permitting decentralized administration, the federal agency is further removed from influence on the procedures employed at the local level. Furthermore, the state agency, which promulgates the hearing regulations, also is more removed from the administrative process when it supplies only supervisory functions.

By granting the states the option of local autonomy, the federal act has created a situation in which the promulgation of effective and universally applicable hearing regulations is substantially more difficult. The result is that such regulations often fail to be enacted.

*Conclusion.* Although the above analysis indicates some of the reasons for the inconsistencies and omissions in the state hearing regulations, the essential fact remains that voluntary compliance runs counter to the perceived goals of state welfare agencies. The institutional position of the state boards is that they want to maximize discretion. One route to this end is to minimize the need to apply due process standards. Such standards, therefore, can be uniformly effectuated only through the promulgation of mandatory regulations supported by effective enforcement procedures. Any attempt to secure compliance short of creating adequate machinery for the enforcement of federal regulations, will, of necessity, fall short of the desired goal: to make the welfare hearing process an effective and efficient means of insuring due process in the administration of public assistance.

## APPENDIX

The following Table provides a comparison of the state hearing regulations with the federal requirements. The individual state provisions are rated on the following basis: C—Complies with the federal requirement; I—Insufficient provision; N—No provision at all; R—Restricts or violates the federal requirement.

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states have an overall compliance percentage of 50 percent. The "state supervised" states provide only 44 percent compliance. In comparing performance based on the twelve "essential" requirements, the "state administered" states have a 45 percent level of compliance while the "state supervised" states record only a 37 percent compliance figure.

320. See Figure 20 *supra*; HEW REPORT, *supra* note 68. Note that four out of the top five states in terms of compliance with federal requirements have state administered systems.

Due Process	N	C	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N
Need for Attorney	N	C	N	I	C	N	N	I	N	N	N	N	N	N	N	N	N	N
Notice of Judicial Review	N	N	N	C	C	C	C	C	N	N	C	N	N	N	N	N	N	N
Right to Examine Official Record	C	C	N	C	C	C	C	C	N	C	N	C	S	C	C	C	C	C
Publication of Hearing Decisions	N	N	N	N	N	C	C	N	N	N	N	N	N	N	N	N	N	N
Binding Effect of Decisions	C	C	N	C	N	C	C	N	N	N	C	C	N	N	N	N	N	N
Retroactive Payments	C	I	R	C	C	C	C	C	N	C	C	N	R	N	I	N	N	N
60-Day Rule	C	C	C	C	R	I	C	C	N	N	C	C	I	C	N	N	N	N
Exclusive Record Clause	I	C	I	I	C	C	N	N	N	N	C	C	N	N	N	N	N	N
Impartial Hearing Officer	C	I	N	C	N	C	R	N	C	C	C	I	N	N	N	N	N	N
Formal Hearing Procedures	I	I	C	C	N	C	I	I	I	C	C	I	N	C	C	C	C	C
Withdrawal and Abandonment	C	C	R	C	N	C	N	C	R	C	C	N	I	C	C	C	C	C
Medical Assessment	N	C	N	C	N	C	C	C	N	C	C	C	N	N	N	N	N	N
Convenience Clause	N	C	C	C	C	C	C	N	C	C	C	N	N	N	C	C	C	C
Prohibition of Non-Recod. Information	N	C	N	N	C	N	C	C	C	C	C	N	N	N	N	N	N	N
Prior Examination Clause	R	C	I	C	I	C	N	N	N	N	C	N	N	N	N	N	N	N
Publication of Hearing Procedure	N	N	C	I	N	C	C	I	N	N	N	N	C	I	N	N	N	N
Advance Notice Clause	N	N	N	N	C	N	N	N	N	N	N	N	N	N	N	N	N	N
Adjustment Procedure	I	N	I	N	N	N	C	C	I	C	C	N	I	C	N	C	C	C
Reasonable Time to Appeal	C	N	C	I	C	C	C	C	C	C	C	N	C	C	N	N	C	C
Request Clause	R	C	N	C	I	R	C	C	C	C	C	I	I	N	N	N	I	I
Notice: Full Explanation	N	C	N	R	C	C	N	C	I	N	C	N	N	N	N	N	N	N
Notice: Right to Attorney	N	C	N	C	C	C	C	C	I	N	C	N	N	N	N	N	N	N
Notice: Right to Hearing	C	C	N	C	C	C	C	C	I	C	C	N	N	N	C	C	C	C
Policy Appeal	R	C	N	I	N	C	C	C	N	N	I	C	N	N	N	N	I	I
Traditional Grounds for Appeal	C	C	C	C	N	C	C	C	C	C	C	C	C	C	C	C	C	C
State Agency Responsibility	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C
	Ala.	Alaska	Arizona	Arkansas	Cal.	Conn.	Colo.	Del.	Fla.	Ga.	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas		





Due Process	N	N	N	N	N	N	N	N	N	D
Need for Attorney	N	N	N	O	N	N	I	O	N	O
Notice of Judicial Review	N	O	O	O	O	O	O	O	...	O
Right to Examine Official Record	O	N	N	N	N	O	N	O	...	I
Publication of Hearing Decisions	O	N	O	N	O	O	O	O	...	N
Binding Effect of Decisions	I	N	N	O	O	O	O	N	O	O
Retroactive Payments	I	N	R	O	O	O	O	O	O	O
60-Day Rule	O	O	O	I	N	N	N	N	...	O
Exclusive Record Clause	O	N	O	O	O	N	O	N	O	I
Impartial Hearing Officer	O	O	O	O	O	O	O	O	O	O
Formal Hearing Procedures	O	O	O	O	O	O	I	O	...	O
Withdrawal and Abandonment	O	N	N	N	N	O	O	O	...	O
Medical Assessment	I	N	I	N	O	I	I	O	O	O
Convenience Clause	O	N	R	R	N	N	R	O	...	O
Prohibition of Non-Recod. Information	N	N	I	N	I	N	I	I	I	O
Prior Examination Clause	N	N	O	N	N	O	O	O	N	O
Publication of Hearing Procedure	N	N	N	O	N	N	N	N	...	N
Advance Notice Clause	O	O	O	O	O	O	N	O	...	O
Adjustment Procedure	N	O	O	R	O	N	O	N	...	O
Reasonable Time to Appeal	I	O	R	O	O	O	R	O	O	O
Request Clause	O	N	N	N	O	O	O	O	O	O
Notice: Full Explanation	O	N	N	N	N	N	N	N	O	I
Notice: Right to Attorney	O	O	O	O	O	O	O	O	O	O
Notice: Right to Hearing	O	N	I	O	O	N	I	O	...	O
Policy Appeal	O	O	O	O	O	O	O	O	O	O
Traditional Grounds for Appeal	O	O	O	O	O	O	O	O	O	O
State Agency Responsibility	N	N	N	O	O	N	N	N	N	N
	R. I.	S. C.	S. Dak.	Tenn.	Texas	Utah	Va.	Wash.	West Va.	Wyo.